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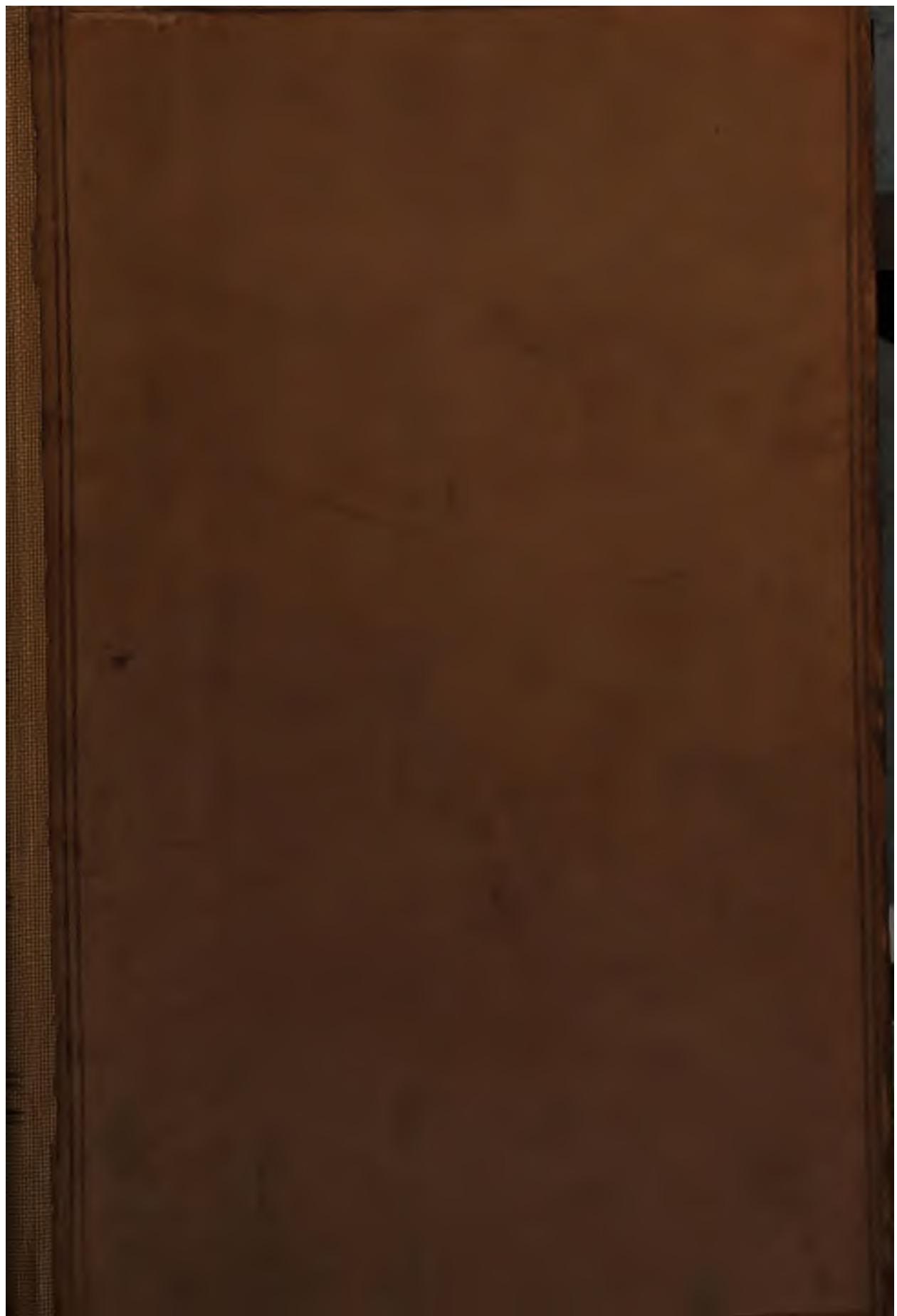
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R E P O R T S
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF
THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

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Sir JOHN ROMILLY, *Master of the Rolls.*

Sir JAMES LEWIS KNIGHT BRUCE,
Sir GEORGE JAMES TURNER, } *Lords Justices.*

Sir RICHARD TORIN KINDERSLEY,
Sir JOHN STUART, }
Sir WILLIAM PAGE WOOD, } *Vice-Chancellors.*

Sir ALEXANDER J. E. COCKBURN, *Attorney-General.*

Sir RICHARD BETHELL, *Solicitor-General.*

A

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OF

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IN
THE ROLLS COURT.

KINDERLEY v. JERVIS.

1856.
April 11, 12,
14.
May 22.

SIR Sandford Graham died on the 18th of September, 1852, intestate, indebted on specialty and simple contract. He was seised of considerable real estate, which was defeated by judgments entered up against the heir, for his personal debts, before suit. The rights of simple contract creditors of an ancestor descended estates are not

The 3 & 4 Will. 4, c. 104, makes real estate "assets to be administered in Courts of Equity" for payment of simple contract debts of the deceased, and the 1 & 2 Vict. c. 110, s. 13, makes a judgment a charge on any lands of which the judgment creditor is seised, &c., or over which he shall have any disposing power, for his own benefit, and it makes such judgment an equitable mortgage thereon. Held, that judgments, entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over the simple contract creditors of the intestate, in respect of the descended estate.

It was not the object, nor is it the operation, of the statute of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate, but as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bond fide* purchaser of the lands, from the heir or devisee, is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves.

The real estate of a deceased person constitutes assets, to be administered in a Court of Equity, according to the priorities specified by the statute, and all the incidents of assets attach to it, and, consequently, such assets are liable, in the first place, to pay the debts of the deceased debtor, and subject thereto, they belong to his devisee or

1856. which descended on his heir at law, the Defendant Sir *Sandford Graham*.

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At the death of the intestate, and subsequently, judgments were entered up against the Defendant Sir *Sandford Graham*, which, being duly registered in the office of the Senior Master of the Court of Common Pleas, became charges on his real estate under the 1 & 2 Vict. c. 110, s. 13.

This bill was filed, on the 2nd *March*, 1854, by the Plaintiff, on behalf of himself and the other creditors of the intestate, and a decree was made on the 15th of *March*, 1855, for taking the accounts and for inquiring as to the incumbrances affecting the real estate of the intestate.

The case came on, upon the chief clerk's certificate, when some of the judgment creditors of the heir insisted that their judgment charges had priority over the simple contract debts of the testator. The question principally depended on the true construction of the statutes of the 3 & 4 Will. 4, c. 104, and the 1 & 2 Vict. c. 110, and it will, therefore, be convenient to state them shortly, in the first instance.

The 3 & 4 Will. 4, c. 104, intituled "An Act to render Freehold and Copyhold Estates Assets for the Payment

heir at law, but the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor.

By the 1 & 2 Vict. c. 110, s. 13, the legislature meant, that a judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is, over which he had a right, at law or in equity, to consider himself the beneficial owner. The introduction of such words as "honestly" or "without committing a breach of duty" appears to be superfluous, for they are necessarily to be understood as forming a part of the clause.

Observations on *Watts v. Porter*, 3 *Ellis & B.* 743.

ment of Simple and Contract Debts," is as follows:—
 "Whereas it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted," &c., that "when any person shall die seized of or entitled to any estate or interest in lands," "which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets, to be administered in Courts of Equity, for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees, of any person or persons who died seized of freehold estates was or were before the passing of this act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

The 1 & 2 Vict. c. 110, s. 13, enacts, that a judgment entered up against any person "shall operate as a charge upon all lands," &c. "of or to which such person shall, at the time of entering up such judgment or at any time afterwards, be seized, possessed or entitled, for any estate of interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall, at the time of

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entering up such judgment or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit," &c. &c.; "and that every judgment creditor shall have such and the same remedies, in a Court of Equity, against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up *had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same* with the amount of such judgment debt and interest thereon."

Mr. R. Palmer, Mr. Follett and Mr. Osborne, for the Plaintiff. The simple contract debts of the intestate are payable out of his real estate, in priority of the judgment creditors of the heir. To hold the contrary, would be to produce the absurd result of paying one man's debts out of another man's estate:—to apply the ancestor's estate in paying his heir's debts in priority of his own, and thus the judgment debts of the heir, entered up prior to the ancestor's death, would, immediately on such death, become a charge on the descended real estate, so as to defeat the creditors of the ancestor himself. But such is not the law, for the heir is only entitled to take beneficially, by descent, that which remains after paying all the debts and obligations of the ancestor; if so, those claiming as judgment creditors of the heir can take no more than the debtor himself.

The statute of the 3 & 4 Will. 4, c. 104, differs in its form from the previous Acts, which made the heir and devisee liable in respect of the lands descended or devised. Here the language is:—"shall be assets to be administered in Courts of Equity for the payment of the just debts." This constitutes the real estate "assets to be

be administered" in equity, and an equitable charge is thereby attached on the assets themselves, which the heir is bound to give effect to. The Court would attach and sell those assets, and grant an injunction against the heir, to prevent their being misapplied, so as to defeat the rights given by the statute to the creditors of the ancestor. Thus, in *Price v. Price* (a), the Vice-Chancellor of *England* held, that the Court had jurisdiction to order the real estates of a deceased debtor to be sold for the payment of his debts in a suit for the administration of his estate, though instituted not by a creditor, but by the heir and the next of kin of the deceased.

The same question which had been decided in *Price v. Price* was subsequently discussed in *Rodney v. Rodney* (b), and the Vice-Chancellor pronounced a judgment which was substantially the same as his judgment in *Price v. Price*.

In *Pimm v. Insall* (c), where the personal estate of a debtor was insufficient to discharge all his debts, it was held, that the right of his simple contract creditors to have their debts satisfied out of his real estate, which had descended to his heiress at law, was not defeated by articles executed by her while still a minor, previously to and in contemplation of her marriage. There Lord *Cottenham* says:—"This case on the articles is simply that of an agreement by an infant heir on marriage, never carried into effect. It is too late to contend that such a contract is binding; how, then, can such an agreement defeat the claims of creditors which existed at the time it was entered into? There is neither

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(a) 15 *Simons*, 484.  
(b) 16 *Simons*, 307.

(c) 7 *Hare*, 193, and 1 *Hall & Twells*, 487, 491.

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sale nor alienation ; and, notwithstanding the well-founded observations, as to the law treating the heir as liable to the ancestor's debts to the extent of the assets descended, and not the land itself as liable, *it is certain that this Court gives to the creditors the benefit of their rights by selling the land itself.*"

Lord *St. Leonards* considered that the statute constituted a *charge* on the real estate. This appears from *Hamer's* Devisees' case (*a*) where a question arose whether the devisee of a deceased shareholder was liable to be placed on the list of contributories. Lord *St. Leonards*, speaking of the 3 & 4 Will. 4, c. 104, says:—"That statute is somewhat ambiguously framed ; but its true construction, in my opinion, is such as to comprehend debts of every description, as *charges* on real estate, whether so charged by will or not." "In my opinion, the object of the legislature, and of the Act, *was to create a charge of debts* on real estate, where no such charge had been made by will, and I do not think that such charge was intended to be restricted only to those debts by specialty, where the heirs were bound."

Not only is the real estate chargeable in the hands of the heir, but in *Evans v. Brown* (*b*), Lord *Langdale* held, that freeholds which had escheated were, as against the lord claiming by escheat, assets for the payment of the testator's debts ; and Vice-Chancellor *Wigram*, in *Viscount Downe v. Morris* (*c*), expressed his determination to follow that decision, considering that the statute had made the real estate assets for payment of the debts, into whomsoever's hands they might come ; *Hughes v. Wells*,

(*a*) 2 *De G., M. & G.* 366. (*b*) 5 *Beev.* 114.

(*c*) 3 *Hare*, p. 400.

Wells (a); Rogers v. Maule (b). So where the mortgagor in fee dies without heirs, and there is no escheat, the mortgagee holds subject to the mortgagor's debts; *Beale v. Symonds (c).*

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We do not dispute that the heir might sell or mortgage the descended estate for a sum of money paid down, for then the purchaser or mortgagee might *bona fide* believe that the money would be properly applied in payment of the debts of the testator, but a judgment against the heir is not such an alienation as will defeat the intestate's creditors. The judgment could not be put higher than an equitable mortgage, and it has been decided by Vice-Chancellor *Kindersley* that an equitable mortgage for the heir's own debt will not prevail against the creditors of the ancestor. This was decided in *Carter v. Sanders (d)*, where the devisees and co-heirs had deposited the title deeds of the ancestor's estate as a security for their own debt, and the question was, whether the deposit was to prevail against the ancestor's creditors. It was argued, that "the real estate had been disposed of by the heiresses at law of the testatrix; and that if there was any remedy, it was against them and not against the purchaser, who was not to be disturbed." But the Vice-Chancellor *Kindersley* held, that the rights of the creditors had not been interfered with, observing, "the personal representative of a creditor cannot, it is true, pursue the title deeds in the hands of an alienee, where the heir has conveyed the legal estate, or all the interest the heir had; but that principle does not apply to a case where the deeds were merely deposited with a creditor for advances."

Secondly,

(a) 9 *Hare*, 749.(b) 1 *Younge & C.*, C. C. 4.(c) 16 *Bear.* 406.(d) 2 *Drewry*, 248, 256.

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Secondly, under the 1 & 2 Vict. c. 110, s. 13, a judgment creditor is entitled to no more than his debtor, for he claims under him, and the heir is only entitled to the real estate which may remain after fulfilling his ancestor's obligation; *Whitworth v. Gaugain* (a); *Brearcliff v. Dorrington* (b); *Dunster v. Lord Glengall* (c).

In *Watts v. Porter* (d), the Court held, that a judgment debtor, by obtaining a charging order, and giving notice to the trustees of a fund, obtained a priority over a prior assignee who had neglected to give notice; but the Court were divided, and the decision was disapproved of in *Beavan v. The Earl of Oxford* (e). The statute, therefore, though general in its terms, must in its construction be restricted within some reasonable limits. Thus it does not supersede the provisions of the Registry Acts; *Johnson v. Holdsworth* (f); or the policy of the law prohibiting a clergyman from charging his benefice; *Hawkins v. Gathercole* (g), reversed by the Lords Justices (h).

A judgment entered up against the heir adversely cannot be said to be an alienation by him (i).

Stroughill v. Anstey (k) was also referred to.

Mr. *Bagshawe* and Mr. *Beavan*, for Sir *R. J. Harvey* and others, whose judgment was obtained in 1853, this suit having been instituted in 1854; and Mr. *Busk*, Mr. *Tripp*, Mr. *Cory*, Mr. *Southgate*, Mr. *Giffard*, Mr. *Jervis*,

- | | |
|---|--|
| 728.
(a) 3 <i>Hare</i> , 416, and 1 <i>Phillips</i> ,
(b) 4 <i>De Gex & Sm.</i> 122.
(c) 3 <i>Irish Ch. & Com. Law Rep.</i> 47.
(d) 3 <i>Ellis & B.</i> 743.
(e) 25 <i>L. J., Ch.</i> 299. | (f) 1 <i>Simons (N. S.)</i> 106.
(g) <i>Ibid.</i> 63.
(h) 6 <i>De G., M. & G. I.</i>
(i) See <i>Ex parte Morton</i> , 5 <i>Vesey</i> , 449.
(k) 1 <i>De G., M. & G.</i> 635. |
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Jervis, Mr. Roupell, Mr. Amphlett and Mr. Morris, for other judgment creditors.

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The simple contract creditors of the intestate have no lien or charge on the descended estate for the payment of their debts, until they have obtained a judgment or decree in their favour; in the meanwhile the heir has an absolute power of disposition over them. The real estates of the ancestor were, in his lifetime, free from any charge or lien in favour of his simple contract creditors, and they descended on his heir equally free, and could only be made available for the ancestor's debts by the same means as they could in the life of the ancestor, namely, by a judgment recovered or by a decree. The heir became personally liable for the ancestor's obligation in respect of the assets which he had by descent, but, in the meanwhile, he had the same power as his ancestor had to alien or charge the descended estate in any manner he pleased, and no case can be found of an injunction before decree to restrain the heir from dealing as he chose with the descended estate. The distinction between the liabilities of an executor and personal assets and the heir and the real assets by descent has always been most marked (*a*). The former is a mere trustee; the personal estate is a trust fund which he is to administer; but the heir has never been considered a trustee, nor has the descended estate ever been considered held subject to a trust for the ancestor's creditors.

In the lifetime of the late Baronet none of his creditors had any charge or lien on his estate, but they might have acquired one by taking proper proceedings, and by obtaining a judgment. They are therefore bound to shew, clearly, by what means, at the death of the ancestor,

(*a*) *Davy v. Pepys*, 2 *Plowd.* 440.

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cestor, they acquired a lien or charge on his real estates, which it is admitted they had not previously.

By the common law, and before the Statute of Westminster the Second, there was no remedy against the heir even for a judgment recovered against his ancestor (*a*), nor was the heir answerable for his ancestor's specialties, unless the ancestor had *bound* his heir (*b*), which expression shews that the heir, and not the estate, was bound (*c*). The heir was bound in his character of heir, and he became the debtor (*d*). The land could only be reached by legal proceedings, and in the meanwhile he had the same power of alienating or charging the estate as his ancestor had.

The nature of the liability of the heir (*e*) is stated by Lord Macclesfield in *Coleman v. Winch* (*f*). He says:—

"The

(*a*) See *Boyer v. Rieet*, 3 *Bulst.* 318, 320, and 14 *Viner's Abr. tit.* "Heir" (B. 2.) pl. 3.

(*b*) The heir is in representation, in point of taking by inheritance, "*eadem persona cum antecessore.*" "No man can charge his heir but as a part of himself, and therefore beginning with himself." *Oates v. Frith, Hobart*, 130.

(*c*) So in the analogous case of *Warrantie* the terms used were "*Ego et hæredes mei warrantabimus.*" *Litt. s.* 733.

(*d*) See the observations of Lord Hardwicke, in *Kinaston v. Clark*, 2 *Atk.* p. 205, citing *Plowden*, 440.

(*e*) The liability of the heir was by the common law, and not under the Statute of Westminster 2. In *Harbert's case* (3 *Coke*, 11 b.), after stating that, at the common law, neither the body of the Defendant, nor his lands, were liable to be taken in execution, but only his goods and chattels, and corn, and the like present profit

which shall grow upon the land, under a *levari facias* and a *fieri facias*, and after referring to the Statute of Westminister 2, giving the writ of *elegit*, Lord Coke proceeds, "But in debt against the heir upon an obligation made by his ancestor, the Plaintiff, by the common law, should have all the land which descended to him in execution against him (see *Plowden*, p. 440); and yet he should not have execution of any part of the land against the father himself; but the reason thereof was, because the common law gave an action of debt against the heir; and in such case, if he should not have execution of the land against the heir, he could have no fruit of his action; for the goods and chattels of the debtor do belong to his executors or administrators; and so for necessity, in such case only, land was liable to execution of the debt of a common person at the common law."

(*f*) 1 *P. W.* 776.

“The bond of the ancestor wherein the heir is bound, becomes, upon the ancestor’s death, *the heir’s own debt*, for which he is suable in the *debet* and *detinet*.” The Lord Chancellor (*a*) further said, “that the law of England, in suits against heirs, imitated the civil law, where an heir sued by a bond creditor is sued as for his own debt in the *debet* and *detinet*, and is *prima facie* supposed to have assets, but that the heir might discharge himself by saying, that, at the time of the writ brought, he had no assets, or, if he has assets descended, may shew those assets, of which the Plaintiff may, if he pleases, take judgment; and that in case the heir aliened before action brought, though at law there was no remedy against him, yet in equity he was responsible for the value of the land aliened; but now the heir is made liable at law (*b*) for the value of the assets he has aliened.”

Sir *L. Shadwell*, in *Spackman v. Timbrell* (*c*), expressed the same opinion as to the liability of the heir and the descended estate, both at common law and under the statutes. He says:—“The common law and the statutes 3 & 4 Will. & M. c. 14, and 47 Geo. 3, sess. 2, c. 74, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable personally to answer for the value of the assets.”

Lord *Langdale*’s language on the subject is very precise in *Richardson v. Horton* (*d*):—“It is clear, that the specialty creditors of Sir *Watts Horton* might, on his death, by adopting the proper proceedings, have obtained payment out of his real estates; but it is equally clear that the bond debts did not of themselves constitute a lien or charge upon those estates. The estates might have

(*a*) 1 *P. W.* 777.

(*b*) By 3 & 4 *W. & M.* c. 14.

(*c*) 8 *Simons*, p. 259.

(*d*) 7 *Beav.* p. 121.

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have been made available: the heir, to the extent of assets, was bound to pay the specialty debts." On a subsequent day Lord *Langdale* observed (*a*):—"Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of the debtor or of his heir. Notwithstanding the existence of such debts, the debtor himself may alienate the land, or he may, by will, make it equitable assets, thereby preventing its exclusive application to the payment of specialty debts, or, as Lord C. J. *Willes* says, he may devise it for the payment of a particular debt on simple contract, and so withdraw it from specialty creditors altogether. By taking proper proceedings, the specialty creditors may obtain payment, out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. The heir, being named in the obligation, is considered to be himself a debtor, not indeed a debtor liable to pay the debt under all circumstances, but liable to the extent of the value of the real estate descended, and he is not restrained from alienation; but after the alienation, he is personally liable to pay his ancestor's debts, to the amount of the value of the land he has aliened."

But it is said that the words of the 3 & 4 Will. 4, c. 104, "*shall be assets to be administered in Courts of Equity for the payment of the just debts,*" constitute a charge on the real estate, or something equivalent to it. Such is not the natural meaning of these words; the simple meaning is, that the lands shall be "assets by descent" for payment of the debts, terms well known at

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(u) 7 Beav. 123.

common law (*a*); but they shall be administered (*i.e.* after a decree or judgment) in equity, for the benefit of all the creditors, and not at law. Again, the heir is only made liable to the same suits in equity as he was before liable, at the suit of specialty creditors; to hold that his estate was *charged* would extend that liability. But these very words have received a judicial construction, and it is important to remark that they are precisely the same as those used in the 47 Geo. 3, c. 74. It has been held, that the same words in this Act created no general lien or charge of debts on the lands. If it had been otherwise, it would have released purchasers from the heir from seeing to the application of their purchase-money in payment of the legacies charged on the real estate. The question arose in *Horn v. Horn* (*b*), and it was held, that “where legacies were charged upon the real estates of a trader, and his devisee and executor sold part of the real estates before the debts were paid; the purchaser, notwithstanding the 47 Geo. 3, c. 74, was liable to see his purchase-money applied in payment of the legacies.” Sir *John Leach* observed:—“The only effect of the statute 47 Geo. 3, sess. 2, c. 74, is to render the heir and devisee of a trader liable to the same suits in equity, at the suit of a simple contract creditor, as they were before liable to at the suit of a specialty creditor, where the heir was bound.”

The statute in question (3 & 4 Will. 4, c. 104), in the same words, must receive the same construction, and the effect must be the same, as that stated by Sir *John Leach*, omitting the words “of a trader.”

The same point was decided upon the same statute  
(47)

(*a*) See *Brooke's Abr. tit. "Assets per Disc."* and 29 Car. 2, c. 3, s. 10.  
“Assets;” *Roll. Abr. tit. Assets* (b) 2 Sim. & St. 448, 451.

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(47 Geo. 3, c. 74), by Sir *L. Shadwell*, in *Spackman v. Timbrell* (a). There the ancestor, being a trader, devised his real estate to his eldest son in fee, who settled it on his marriage. The debts of the trader were left unpaid, and the son afterwards became bankrupt. The unpaid creditors thereupon claimed priority over the settlement, but the Vice-Chancellor of *England* said:—“The common law and the statutes 3 & 4 Will. & M. c. 14, and 47 Geo. 3, sess. 2, c. 74, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable, personally, to answer for the value of the assets.” And Sir *E. Sugden*, after referring to this decision in *Spackman v. Timbrell*, adds (b):—“The 3 & 4 Will. 4, c. 104, which makes freehold and copyhold estates liable to simple contract, as well as specialty debts, would, no doubt, receive the same construction.”

Several statutes have passed extending the rights of creditors, but none of them have altered the nature of the liability of the heir or the principles applicable; and none of them have specifically *charged* the assets by descent with the debts of the ancestor, which would have been the case if such had been the intention. The heir has been made chargeable for trust estates and estates *pur autre vie* (c) (29 Car. 2, c. 3, ss. 10 and 12). Devisees, who by the common law were not liable (shewing that the estates themselves were not chargeable), have been made liable to the extent of the estates devised, similarly to the heir (3 & 4 Will. & Mary, c. 14, ss. 2, 3, 7): the heir has been made answerable for the value of descended land sold before action brought (s. 5). By Sir *Samuel Romilly's* Act (47 Geo. 3, c. 74), the real estates

(a) 8 Sim. 253. 153.

(b) 3 Vend. & P. (10th ed.)

(c) *Seymor's case*, 10 Rep. 98 a.

estates of traders are made “*assets to be administered in Courts of Equity for the payment of all just debts;*” and the last Act (3 & 4 Will. 4, c. 104) enacts, that in all cases real estate “shall be assets to be administered in Courts of Equity for the payment of just debts;” and that the heir shall be liable to the same suits in equity as before the Act he was liable to specialty creditors.

Prior to the 3 & 4 Will. 4, c. 104, the simple contract creditors had no remedy whatever against the real estate of the testator, except in the case of traders ; and it is clearly settled, that prior to that statute the heir could alien, charge or settle the descended estate, even for his own benefit.

In *Mathews v. Jones* (*a*), a marriage settlement of the ancestor's estate by the heir, who was also devisee, was supported against a bond creditor by the ancestor. In *Spackman v. Timbrell* (*b*), a trader, indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died. It was held, that the 3 & 4 Will. & Mary, c. 14, and the 47 Geo. 3, sess. 2, c. 74, did not charge the real assets, descended or devised, with the ancestor's debts, but made the heir or devisee personally liable, to the value of the assets ; and, therefore, that the son's widow and children were entitled to hold the estates, discharged from the debts of the father.

In *Richardson v. Horton* (*c*), the settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor. In that case the ancestor died indebted
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(*a*) 2 *Anstr.* 506. (*b*) 8 *Simp.* 253. (*c*) 7 *Beav.* 112.

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in specialty. After his death, on the marriage of his heiress, a settlement was executed, whereby (after reciting the insufficiency of the personal estate to pay the debts, and that a considerable sum was due on that account) a part of the estates were conveyed to provide a fund to pay the debts, and the remainder was settled on the heiress, her intended husband and their issue. The estates appropriated to the payment of the debts were found insufficient, but the settlement was upheld against the specialty creditors.

It is said, that the principle does not apply to equitable mortgages, which, it is argued, is not an alienation, and *Carter v. Sanders*(a) is cited, where title deeds had been merely deposited. But the contrary was held in *Ex parte Baine*(b). There a bankrupt, being entitled to one-third part of freehold property, as heir at law to his brother who was a trader, deposited the title deeds of the property with his bankers to secure advances. It was held, that the lien of the bank had preference to any claims of the brother's creditors. Sir John Cross said (c):—"This enactment clearly shows, that the creditors can only charge the heir in respect of the land, and not the party to whom the land has been *bonâ fide* aliened. It appears to me, therefore, that the lien of the bank extends to the brother's one-third of the estate, notwithstanding the claims of the brother's creditors."

It does not follow, because the judgments are against the heir, that the debts on which they were obtained were not incurred in raising money to pay off the ancestor's debts, and which the heir had full power to do. The debt of the ancestor becomes the debt of the heir, because

(a) 2 *Drewry*, 248. (b) 1 *Mont., D. & De G.* 492.  
 (c) Page 496.

because his ancestor bound him, yet he is liable no further than to the value of the land descended; and so soon as he has paid his ancestor's debts to the value of the land, he (the heir) shall hold the land discharged; *Buckley v. Nightingale* (*a*).

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Secondly, the heir having full power to charge the descended estate, the 1 & 2 Vict. c. 110, is positive that a judgment shall operate as a charge on all lands to which the judgment debtor may be or become seised for any estate over which he has a disposing power, which he might, without the assent of any other person, exercise for his own benefit. Here the heir was seised, and according to *Spackman v. Timbrell*, *Richardson v. Horton*, and *Mathews v. Jones*, had a disposing power, which he might, without the assent of any person, exercise for his own benefit.

The statute having thus created a legal "charge upon all lands," proceeds to give to the judgment creditor the same remedies in equity, against the heirs so "charged," as he would be entitled to if the judgment debtor had "power to charge the same," and had, by writing under his hand, agreed to charge the same. This Court, therefore, must look on these lands as agreed to be charged, and actually charged by virtue of the Act, and consequently, the simple contract creditors must be postponed to the judgments against the heir entered up prior to the decree in their favor.

Price v. Price (*b*) and *Rodney v. Rodney* (*c*) have little application. No doubt, in administering the estate upon a decree, the Court would order a sale, but that does not prove the existence of a charge prior to the decree;

(*a*) 1 *Strange*, 665. (*b*) 15 *Sim.* 484. (*c*) 16 *Sim.* 307.

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1856. decree; and in those cases the heir did not object. In *Hamer's* Devisees' case (*a*), the question whether the real estate was charged by the 3 & 4 Will. 4, c. 104, did not arise. The only point was, whether the devisee was chargeable for the debts of a public company, in which the testator had shares, incurred after his death, and Lord *St. Leonards* considered that the "debts" in that statute were not restricted, as in the 3 & 4 Will. & M. c. 14, to debts on which an action of debt would lie, but comprehended debts of every description. In speaking of the liability of the estate to contingent debts, he uses the word "charge" perhaps improvidently, but he did not so decide, and he has expressed an opposite opinion when he was considering the express point (*b*).

Woodgate v. Woodgate (*c*); *Whale v. Booth* (*d*); *Farr v. Newman* (*e*); *Ram, on Assets* (*f*); *Ex parte Morton* (*g*), and *Finch v. Lord Winchelsea* (*h*) were also cited.

Mr. *Lloyd*, for the legal personal representatives.

Mr. *F. T. White*, for the heir.

Mr. *R. Palmer*, in reply, cited *Storry v. Walsh* (*i*); *M'Leod v. Drummond* (*k*), and *Beale v. Symonds* (*l*).

The Master of the Rolls reserved judgment.

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| (<i>a</i>) 2 <i>De G., M. & G.</i> 366. | (<i>g</i>) 5 <i>Ves.</i> 449. |
| (<i>b</i>) 3 <i>Vend. & P.</i> (10th ed.) 153. | (<i>h</i>) 1 <i>P. Wms.</i> 277. |
| (<i>c</i>) <i>Ibid.</i> 153. | (<i>i</i>) 18 <i>Beav.</i> 559. |
| (<i>d</i>) 4 <i>Term Rep.</i> 625, n. | (<i>k</i>) 14 <i>Ves.</i> 361; 17 <i>Ves.</i> 152. |
| (<i>e</i>) <i>Ibid.</i> 621. | (<i>l</i>) 16 <i>Beav.</i> 406. |
| (<i>f</i>) Pages 278, 398, 2nd Ed. | |
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The Master of the Rolls.

The question in this cause is, whether in the present state of the law, that is, under the statutes now in force, the estate of an intestate is liable to the judgment debts of the heir, to the exclusion of the simple contract debts of the intestate.

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The intestate, Sir *Sandford Graham*, died on the 18th of *September*, 1852, indebted at the time of his death to various creditors by simple contract. The present Baronet, his son and heir, had contracted debts which were secured by judgment entered up against him previously to the decease of his father; he has also contracted debts secured by judgment entered up against him since his father's death.

The question is, whether judgment creditors, of either or both these classes, are entitled to be paid out of the descended real estate of the late Baronet before his simple contract creditors are paid. Upon the fullest consideration which I have been able to give this case, I can discover no principle, or any words in the statutes, which affect this question, which can make any difference between these two classes of judgment creditors, viz., those whose judgments were entered up against the son before the death of the ancestor, and those which have been entered up since that period. They must, in my opinion, stand on the same footing, and are entitled to the same right, subject only to the priority arising from the dates of the judgments. This case depends, first, on the effect and construction of the statute of 3 & 4 Will. 4, c. 104, and next upon the effect and construction of the statute of 1 & 2 Vict. c. 110. The statute of 3 & 4 Will. 4, c. 104, is in these words—[*His Honor read it.*]

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Having been mainly instrumental in the passing of that Act, which was introduced by me into Parliament, and which passed both Houses of Parliament without any discussion, I can speak with confidence as to the intentions of the legislature with regard to it, assuming that they adopted the explanations given on its introduction, and to such members as without public discussion inquired into and canvassed the construction and probable operation of the proposed statute. I admit that such intention must be disregarded, if it do not appear in the words of the statute itself, and that these words must be read according to their plain meaning, illustrated, where ambiguous, by the decisions of the Courts which have put a construction upon them. I believe, however, that, upon examination, it will be found, that the intention of the legislature, the plain import of the words used, and the decided cases, all concur as to the meaning and effect of that statute. The preamble of the Act expresses that the intention of the legislature is, to provide for the payment of the debts of deceased persons, and to effect this purpose, it enacts, that the real estate of a deceased person, not charged by will or devised for payment of his debts, shall be assets to be administered in equity for the payment of all his debts, whether due on specialty or by simple contract. This is the main scope and object of the Act, the rest is but auxiliary to it or explanatory of it. This was stated to be the end, to accomplish which the Bill was introduced into Parliament: this is the purpose expressed in the preamble: this is the object stated in the title of the Act: although, by a misprint, the word "and" is there improperly introduced between the word "simple" and the word "contract." The rest of the Act only specifies the mode by which this object shall be worked out; it provides what suits may be instituted against the heir and devisee, and it adds a proviso, that specialty debts of

of the deceased debtor shall be paid before simple contract debts. In the case of *Price v. Price* (a), the Vice-Chancellor of *England* adopted this construction, and ordered the sale of real estate of an intestate in a suit instituted by his children for the administration of his estate.

In *Rodney v. Rodney* (b), the same point was decided by the Vice-Chancellor of *England*, in a suit instituted, not by a creditor of the deceased debtor, but by a person interested in his estate under his will. In *Re Hamer's Devisees* (c) the Lord Chancellor held, that the Act created a charge in favour of creditors on the real estate of a deceased testator, where no such charge had been made by will, and this not only where the debt was actually due at the death of the testator, but also where the debt arose subsequently, out of obligations entered into by him in his lifetime. I also adopted a similar view of the effect of the statute in *Beale v. Symonds* (d).

These decisions appear to me accurately to express the true meaning of the statute. The cases relied upon on the other side, viz., *Horn v. Horn* (e); *Spackman v. Timbrell* (f); *Richardson v. Horton* (g), are not, in my opinion, inconsistent with the view I have expressed, or with the cases cited. The two former arose on the statute of 47 *Geo. 3*, c. 74, in which exactly the same words are used as in the 3 & 4 *Will. 4*, c. 104, restricted, however, to the case of traders. Cases under the former statute are therefore to be treated exactly the same as if they had been decisions on the present statute, but they do

(a) 15 *Sim.* 484.

(e) 2 *S. & St.* 448.

(b) 16 *Sim.* 307.

(f) 8 *Sim.* 253.

(c) 2 *De G., M. & G.* 366, 372.

(g) 7 *Beav.* 112.

(d) 16 *Beav.* 406.

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do not, in my opinion, touch this point. In *Horn v. Horn* (*a*), the question was, whether the purchaser of a real estate charged with legacies was bound to see to the application of his purchase-money in payment of those legacies, and it was held, that the statute had made no difference in that respect. *Spackman v. Timbrell* (*b*), decided, that a purchaser for value of the lands of a deceased debtor might hold these lands against his creditors. *Richardson v. Horton* (*c*), was under the statute of 3 & 4 Will. & Mary, c. 14; it decided, that the settlement of lands descended, made by the heir on his marriage, was valid against the specialty creditors of the ancestor. The distinction between these cases and those above cited consists in this:—it was not the object, nor is it the operation, of the statute of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate, but as the statute makes the land *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bonâ fide* purchaser of the lands, from the heir or devisee, is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves. The purchaser assumes, as in the case of the sale of personal assets, that the sale is required for the due administration of the estate and affairs of the deceased debtor, and is not bound to inquire further. The case would be varied in either case, if the purchaser had received direct knowledge that the sales were made for the purpose of defeating creditors, and had thereby become a participator in the fraud.

On the first point, therefore, I am of opinion, that the

(*a*) 2 Sim. & St. 448.      (*b*) 8 Sim. 253.      (*c*) 7 Beau. 112.

the real estate of a deceased person constitutes assets, to be administered in a Court of Equity, according to the priorities specified by the statute, that all the incidents of assets attach to it, and that, consequently, such assets are liable, in the first place, to pay the debts of the deceased debtor, and that, subject thereto, they belong to his devisee or heir at law, but that the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor.

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The next question then arises, whether a judgment entered up against the heir or devisee constitutes such an alienation by him of the lands descended or devised as to enable the judgment creditor to take the lands in execution for the debt, in priority to the debtors of the ancestor or the testator, or whether the judgment entered up affects only the beneficial interest of the judgment debtor. This depends upon the statute of 1 & 2 Vict. c. 110. Unless the effect of the judgment be extended by this statute to affect property in the possession of the judgment debtor, beyond the extent of his beneficial interest therein, no question could arise, assuming that the same principle which applies to personal assets were held to apply also to real assets. In the case of personal assets of a deceased person, it is quite settled, that these could not be taken in execution by the judgment creditor of the executor. This is decided by several cases, and the consequences of holding the contrary doctrine is pointedly displayed by Lord *Eldon* in *M'Leod v. Drummond* (a), who, commenting upon the case of *Farr v. Newman* (b), where Mr. Justice *Buller* had differed from the rest of the Judges, observes, that if his opinion had prevailed, a creditor of the testator,

who

(a) 17 *Vca.* 169.

(b) 4 *Term R.* 635.

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who had used all the diligence he could, would be defeated, as a creditor of the executor, having got judgment in the term before the death of the testator, might, according to that opinion, execute that judgment upon the effects of the testator, as well as on those of the executor, long before any creditor of the testator could, by possibility, get judgment.

That proposition, which Lord *Eldon* seems to have considered as too monstrous to be gravely argued, is, as regards real assets, openly contended to be the result of the statute of the 1 & 2 Vict. c. 110. For, as I have already observed, and as will be plain when the section of the statute is examined, no distinction can be drawn between judgments obtained against the heir or devisee in the life of the ancestor or testator, and those subsequently entered up. If the present contention therefore prevail, it would necessarily follow, that the creditor of the heir, in respect of a judgment entered up in the lifetime of the intestate, would take the descended lands, not only in priority to the simple contract creditors of the intestate, but in priority also to the judgment creditors of the intestate, whose judgments were entered up subsequently to the judgment against the heir. This would be, in fact, to enact, that one man's debt is to be paid out of another man's property, and that property which *prima facie* belongs to the creditors of a deceased person shall be applied in payment of the debts of his heir or his devisee. No doubt, if the legislature has so enacted, however much we may be startled at the proposition, and however much we may doubt that the consequences of their legislation were fully and distinctly presented to both Houses of Parliament, this Court must carry these enactments into effect, disregarding the consequences ; but, I apprehend, that in such a case, this Court must see, very clearly and distinctly,

tinctly, that the words of the statute compel it to come to a conclusion, which, at first sight, appears to be so contrary to common sense, common justice and common law. The section of the statute on which this question depends is the thirteenth, which enacts in what way the judgment is to operate as a charge on real estate. [*His Honor here read it.*]

The judgment entered up against a person therefore first operates as a charge upon all lands which such person shall, at any time afterwards be seised, or possessed of, or entitled to, for any estate or interest at law or equity. This part of the clause does not authorize the present contention, because the only interest which the heir or devisee takes in the lands descended or devised is subject to the payment of the charges upon them, viz., the payment of the debts of the deceased, so far as they are properly applicable to that purpose. The clause goes on, however, to say, that the judgment shall operate as a charge on all lands over which the person, against whom it is entered up, shall, at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit. And the argument is, that as he might undoubtedly, according to the settled law, have sold these lands to a purchaser for value, and might then have applied the money for his benefit, instead of paying the debts of the deceased (which it was his duty to do), therefore, these lands must be subject to the judgments against him. In other words, the question resolves itself into this:—whether the word “honestly,” or some equivalent expression, is to be understood as if introduced into this clause, and governing the cases in which the debtor might dispose of lands for his own benefit.

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Apart from decided cases, I should have felt no difficulty or hesitation in arriving at this as being the true construction of this part of the clause. In my opinion, these words do not authorize the contention now urged before me. What I apprehend the legislature meant was this:—that the judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is, over which he had a right, at law or in equity, to consider himself the beneficial owner. The introduction of such words as “honestly,” or “without committing a breach of duty,” appears to me to be superfluous, and that they are necessarily to be understood as forming a part of the clause. It cannot, I think, have been the intention of the legislature to say, that the judgment creditor shall acquire a charge on lands which do not in reality belong to the judgment creditor, but over which, by operation of law, he has such a disposing power, that if he were fraudulently disposed, he might sell them and put the money in his own pocket. Suppose the case of the conveyance of an estate to *A.* and his heirs, in consideration of 10,000*l.*, and a contemporaneous deed executed, by which *A.* declares that the money was advanced by *B.* for the purpose of the purchase, that *B.* is the beneficial owner, and that he, *A.*, holds the estate in trust for *B.* *A.*, if fraudulently disposed, could sell that estate to a purchaser for value without notice, and might squander the purchase-money, and yet the purchaser could hold the estate against *B.*, of whose interest in it he had no knowledge or suspicion. Can it be said, in such a case, that the beneficial interest in the estate would be taken from *B.* and applied to pay *A.*’s judgment creditors? Or, in other words, that *A.*’s judgment creditors might take *B.*’s estate, because *A.* had the power which he did not exercise

cise of fraudulently parting with the estate, or obtaining the value of it for his own benefit. It seems to me impossible, that the proposition so stated could be deliberately laid down in any court of justice. It would, in fact, enable the last surviving trustee of real estate, in all cases, by confessing judgments, to obtain the interest of his *cestui que trust*, whether the judgment creditor had or had not notice of the trust. If then, the true construction of the Act be to create a charge in favour of the judgment creditor, on lands over which the judgment debtor had a *bonâ fide* disposing power, one which he might exercise for his own benefit without committing a breach of duty and no others, then it follows, that the judgment only binds the beneficial interest of the debtor in the lands over which he has a disposing power, and not the interest of other persons in those lands which he might, by improper conduct, obtain possession of.

It remains to be seen, how far this view is inconsistent with the decided cases in Equity. They are all one way.

In *Whitworth v. Gaugain*(a), it was held by Sir *James Wigram*, and afterwards, on appeal, by Lord *Lyndhurst*(b), that an equitable mortgagee was entitled to enforce his charge on the lands of the debtor, in priority to a subsequent judgment creditor who had obtained actual possession of the land by *elegit* and by attorney from the tenant; on the ground, that the beneficial interest of the judgment debtor alone was affected by the judgment; and that this was subject to the prior equitable mortgagee upon it. To apply the principle of that decision to the present case, if the heir had taken

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(a) 3 *Hare*, 416.

(b) 1 *Phillips*, 728.

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the descended lands unincumbered, and had created an equitable mortgage upon them, to the extent now claimed by the creditor of the ancestor, the subsequent judgment creditor could only have taken the estate subject to that equitable mortgage. Here, the estate of the ancestor descends upon him charged with debts to that amount to the creditors of the ancestor, not, it is true, as a specific mortgage, but as a consequence of their being assets of the ancestor. In both cases, when the judgment is entered up, the heir has only such an interest in the estate as may remain after payment of the same amount of debts; in both cases, he might have aliened to a purchaser for value without notice, and he had, by the means of committing a gross breach of duty, a disposing power over the estate, without the assent of any one, for his own benefit. In my opinion, no reasonable distinction exists between the two cases. This view of the case is confirmed by the decision of the Lord Justice *Knight Bruce* in the case of *Brearcliff v. Dorrington*(a), where that learned Judge observes(b), "I doubt whether this provision (of the statute) enables him (*i. e.* the judgment creditor) to obtain more than his debtor had at the time fairly to dispose of." This is also followed by the Master of the Rolls in *Ireland*, who, in the case of *Dunster v. Lord Glengall*(c), cites and expresses his approbation of the passage above referred to. If the decisions stopped here, it would conclude the case before me. Undoubtedly, the present Baronet had, in equity, no beneficial interest in descended lands, beyond the surplus which might remain after the due administration of the assets of the intestate, both real and personal. But this subject has undergone the solemn decision of the Court of Queen's Bench

(a) 4 *De G. & Sm.* 122. (b) Page 124.  
(c) 3 *Irish Ch. & Com. Law Rep.* 56.

Bench in the case of *Watts v. Porter* (a). That was an action against a solicitor for negligence, for not giving notice to trustees of a charge created by the beneficial owner of stock. The question whether there was negligence or not depended on whether a judgment against the beneficial owner, entered up subsequently to the charge, and on which judgment a charging order had been obtained, under the 14th section of the Act, had or had not priority over the charge previously made to the client of the solicitor. The Lord Chief Justice and Justices *Wightman* and *Crompton* held, that the judgment had priority. Justice *Erle* dissented from that view, and held that it had no priority, and that the judgment only affected the beneficial interest of the debtor. The question was not precisely the same as in the present case, as that arose under the 14th section of the statute, while the present arises under the 13th section. The words in the latter section are, "if any persons against whom a judgment shall have been entered up shall have any stock standing in his own name, in his own right, or in the name of any person in trust for him," &c. The question therefore which arose was, whether the judgment affected the whole stock, or only so much of it as was not affected by the previous charge, and much of the argument and decision turned on the effect of notice. Some of the words of Lord *Campbell's* judgment (b) go to the full extent of the contention before me. They are as follows:—The Lord Chief Justice says—"Every tribunal, administering justice according to the statute must consider only the effect intended by the legislature to be given to the charging order; and this is to be learnt from the language in which the meaning of the legislature is expressed, without interpolating something not to be found. In the 14th section, it gives, in the most unequivocal terms, the same remedies

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remedies to the judgment creditor, who has obtained the charging order, to which he would have been entitled 'if such charge had been made in his favour by the judgment debtor.' The Defendant's Counsel contended that we are bound to understand the word 'honestly' to be implied, and that the charging order is only to have the effect which a charge of the debtor would have had, if made *honestly*. To interpolate the word 'honestly' would, we think, be a qualification of the enactment wholly unauthorized. The words, that are to be understood as implied by the legislature, we think, are 'validly' and 'effectually.' The debtor could not validly and effectually make a charge, to have priority over an *antecedent* equitable charge to which the incumbrancer has completed his title: and therefore the charging order has no such operation: but, the first incumbrancer not having completed his title by notice to the trustees, the debtor might make a charge to a subsequent incumbrancer, which in point of law would be valid and effectual." It is true that his Lordship refers to and approves of *Whitworth v. Gaugain*, and seems to take the distinction, that in that case the equitable title was completed, and that it was not so in the case of *Watts v. Porter*. But I apprehend that the equitable charge was complete and perfect in the case of *Watts v. Porter*, as between the mortgagor and mortgagee, and that it would have been so held in equity against all persons having notice of that charge in any way. The effect of the notice given to the trustees is, first, to give notice to them of the incumbrance, that is, to give them notice that a new person is one of their *cestuis que trust*, and, consequently, to make them liable for a breach of trust, if they part with the fund without regard to that incumbrance; and, secondly, it gives notice to all persons of such incumbrance, and after it, no person can claim as an incumbrancer without notice; and accordingly, as between

between innocent persons, that is, persons who have advanced their money without notice, it gives priority to him who gives the first notice.

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The reason why a subsequent incumbrancer without notice, who gives the first notice, is preferred is, on the principle that a purchaser for value without notice is entitled to hold the property against the whole world. This, in my opinion, is correctly explained by Justice *Erle* (*a*) :—" Furthermore, the claim to take the stock from the first mortgagee is, not a remedy against the debtor, for he has lost the stock in any event, but a remedy against the first mortgagee,—a remedy given upon the general principle for deciding which of two innocent claimants shall suffer by the fraud of a third party, namely, he who facilitated the fraud." I concur also in his subsequent observations, where he says (*b*),—" Now a judgment creditor is in no analogy with a second mortgagee who has been deceived into taking, as unencumbered, a security that was encumbered. The judgment creditor has trusted to no particular security: he has rights, which may be made to charge all the available assets of the debtor, and, amongst the rest, the stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof: and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of any fraud. The reason, therefore, for giving priority to a second mortgagee over the first wholly fails in respect of a judgment creditor." It is true that this relates to the 14th section; but not only the observations I have read from the judgment of the Lord Chief Justice clearly shew, that the decision of the Court must govern both sections, but this is also put beyond doubt by the remark of Lord *Campbell* in page 758, where he observes,

(*a*) Page 760.

(*b*) Page 761.

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observes, that the learned Judges put the same construction on both the 13th and 14th sections. In considering this decision, this question naturally occurs, why does not the judgment creditor of a person in whose name stock is standing as trustee take that stock away from the *cestuis que trust* and beneficial owner. The answer is, that the legislature has prevented this, by providing, in the early part of the clause, that the stock is not to be taken, unless the person in whose name it is standing has it of his own right. But then, on what principle can it be explained, that the legislature should have limited the effect of the judgment in one case to the beneficial interest, and in the other extended it beyond? It may certainly be urged, that *expressio unius, est exclusio alterius*, but I think that it would rather seem that these words, "in his own right," are intended as a clue to the meaning of the rest of the section, and that, in like manner, the commencement of the 13th section, which limits the operation of the judgment to the beneficial interest of the debtor, is intended to regulate and govern the subsequent words of that clause.

This decision, at the time it was pronounced, produced, as might be expected, a considerable sensation in the profession. If it be law, it undoubtedly concludes the present case; and if the word "honestly" is not to be understood as introduced into the 13th section, but it is held, that the judgment creditor is entitled to a charge on all lands which the judgment debtor, otherwise than honestly, might dispose of for his own benefit, without the assent of any one, then the judgment creditors of the present Baronet are entitled to take the descended lands, to the exclusion of the creditors of the late Baronet. Considering, however, the difference of opinion between the Judges themselves in

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Watts v. Porter, the conflicting character of that decision with the decisions I have already referred to, and the consequences to which it would lead, not the least serious of which is the blow it strikes at the foundation of morality, on which all laws are or ought to be based, it can hardly be expected to govern subsequent cases without further confirmation.

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The question, in one of its many forms, is of constant recurrence, and accordingly the subject and the decision in *Watts v. Porter* came under the review of the Lord Chancellor and the Lords Justices in the case of *Beavan v. Lord Oxford*(a). The form which the question then took was this:—The late Lord *Oxford* had, by voluntary settlement of 3rd *July*, 1838, granted an annuity of 2,000*l.*, and issuing out of certain lands, to Lady *Oxford*. Some judgments were afterwards entered up against him; the question was, whether the subsequent judgments were entitled to priority over the arrears of the annuity. It was argued there, first, that, under the 27 *Eliz.*, the voluntary settlement was absolutely void against a purchaser, whether with or without notice, and that a judgment creditor was a purchaser within the meaning of that statute; but it was held by the full Court, that he was not. Then arose the next question, which arises in this case before me, and which was incidentally decided in the case of *Watts v. Porter*, viz. inasmuch as this was clearly an instance where, in the words of the 13th section of the 1 & 2 *Vict.*, the judgment debtor might, for his own benefit and without the assent of any one, have disposed of the land discharged from the annuity, whether these lands were not primarily liable to the judgment debts. The Lord Chancellor and the Lords Justices, after taking time to consider

(a) 2 *Jur. N. S.* 121.

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sider their judgment, unanimously decided, that the annuity and so much of the lands charged with it as were necessary for the support of it, were untouched by the subsequent judgments; that the 13th section of the Act only affected the real beneficial interest of the judgment debtor, and that this being disposed of by him *bonâ fide* prior to the judgment, although by a merely voluntary instrument, it was not his at the date of the judgment, and was not affected by any judgment subsequently entered up against him. The case of *Watts v. Porter*, which had been strongly urged in argument, was discussed and considered by the Court, and was endeavoured to be distinguished by the Lord Chancellor; but if not distinguishable, was dissented from by him, and was also commented upon and disapproved of by the Lord Justice *Turner*.

As I concur in the decision of their Lordships and the arguments by which it was supported, I must come to the conclusion, that the decision in *Watts v. Porter* is not to be treated as an authority to govern me in the consideration of the case before me. I am therefore of opinion,—

First, that the heir takes a beneficial interest in the descended assets of the ancestor, only to the extent that the same are not required for the payment of the debts of the ancestor in a due course of administration.

And secondly, that under the 13th section of the 1 & 2 Vict. c. 110, only the beneficial interest of the debtor is affected by a judgment entered up against him.

And consequently, that the judgment creditors of the present Baronet have no lien upon or interest in the descended real estate of the late Baronet, beyond the surplus thereof not required for the payment of his debts in a due course of administration.

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*In re "THE UNIVERSAL PROVIDENT LIFE ASSOCIATION."**May 5.*

THIS insurance company was established in 1853, and the terms were regulated by a deed of settlement dated the 23rd of *February*, 1853, by which the several shareholders entered, as between themselves, into covenants usual in such cases.

In the beginning of 1855, a circular was issued by the secretary of the company, the material portions of which were as follows :—

“ *Universal Provident Life Association,*
“ *Established A.D. 1849.*
“ *London Bridge.*

“ Sir,—Owing to a great extension of the business of the above company, the directors have determined to increase the ‘reserved fund,’ and for that purpose have created an additional capital of 200,000*l.*, by the issue of 40,000 new shares of 5*l.* each, the deposit on which is 1*l.* per share.”

This circular letter then proceeded to state that the directors, being anxious to distribute those shares, had determined to employ *canvassers*, in lieu of brokers, and in order to interest these parties in the extension of the company’s business, to allot (free of payment) five shares to each canvasser, and pay 5*s.* per share on all shares disposed of by each canvasser.

Where, after the objects of a company have totally failed, and it is insolvent, and practically at an end, other persons are induced to join the concern, and even sign the deed, by misrepresentations made by the directors as to the flourishing state of the concern, they are not liable to be made contributories.

The result would be different, where the misrepresentations are made by the proprietors on the original constitution of the company, and the question of contribution arises between a number of innocent shareholders.

In *January*, 1855, Mr. *Bell*, a retired customs revenue officer,

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In *November*, 1855, an order was made for winding up the company, and the official manager applied to have Mr. *Bell's* name inserted as a contributory for the five shares. Mr. *Bell* resisted this, on the ground that he had been induced to take the shares under fraudulent misrepresentations. The case was adjourned from chambers to be heard in Court. The circumstances on which he relied were, in substance, as follows:—

It appeared, that in *October*, 1854, the company was in great pecuniary difficulties. A creditor for 37*l.*, who, on the 16th of *November*, 1854, applied for payment, was requested to draw a bill on the company at two months for 50*l.* On the 4th of *November*, 1854, their pressing liabilities amounted to 753*l.*, while those which could be postponed were 1,888*l.*, and to relieve the pressure it was suggested, that the directors should each subscribe 50*l.*

Besides this, a resolution, entered in the books on the 27th of *September*, 1854, was as follows:—"That until shares

shares have been sold or money obtained, to the amount of 500*l.*, and that amount paid into the bankers, it is not desirable that a further expenditure be made by the company."

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By another resolution, entered in the books on the 30th of *October*, 1854, it was resolved as follows:—  
 "That a letter be written to the whole of the agencies who are indebted to the society, to send up forthwith their accounts and the premiums due from them to the 30th of *October*, inclusive, pending which, it is desirable not to incur any fresh outlay or enter into any fresh engagements."

The company afterwards got into still greater difficulties, they became indebted to the clerks and others; in *September* or *October*, 1855, a distress was levied for rent; and ultimately, in *November*, 1855, the order was made for winding up the company.

Mr. *Selwyn* and Mr. *Beavan*, for the official manager. Mr. *Bell* having accepted five shares and executed the deed became clearly a shareholder, entitled to participate in the profits and consequently liable to contribute towards the liabilities of the company.

Mr. *Roxburgh*, *contra*, for Mr. *Bell*. The shares were taken upon the faith of the representations as to the flourishing state of the company, whereas, in fact, it was, at the time, in a state of utter insolvency. The fraudulent misrepresentations of the directors, therefore, invalidates the contract; *Wontner v. Shairp*(a); in that case, the Plaintiff had taken shares on the representation of the committee, contained in an advertisement, that 120,000 shares of the company had been allotted,

whereas

(a) 4 C. B. Rep. 404.

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whereas 58,000 only had been taken. The Court held, that the Plaintiff was not bound by his signature to the subscription deed, and that he was entitled to recover back his deposit. Mr. *Bell's* contract was to take shares in a solvent and flourishing company, and he is not to be made responsible for a different and an insolvent one; *Amazon Life Assurance and Loan Company* (*a*); which case was reversed by the Lords Justices (*b*) on different grounds, thus leaving the principle of the first decision unaffected. The circular states, that there had been, "a great extension of the business of the above company," this was wholly untrue; "that the directors had created an additional capital of 200,000*l.* by the issue of 40,000 new shares," which was equally false. The company, in *February*, 1855, was in a state of insolvency, as is shewn from their debts and difficulties, and is proved by their books. It appears that all the original shares were not allotted, and that, independent of the directors and the canvassers, there were not more than forty shareholders. At the time *Bell* joined the association, its objects had failed, it was insolvent, and the effect of the resolutions of *September* and *October*, 1854, was to put an end to the concern.

Mr. *Selwyn*, in reply. On the establishment of all companies, the prospectuses contain rather glowing and over-charged representations, but these are known, and deceive no one, neither do they invalidate the partnership contract. If it were otherwise, where can you draw the line, and say that no subsequent shareholder shall be a contributory? Take the first person who signed the deed, would he be relieved from being a contributory? and so of those who subsequently joined the concern. One of a hundred partners in a concern cannot get rid of his engagements towards ninety-nine others because

(*a*) 3 *Drew.* 409.(*b*) *L. Justices*, March 13, 1855.

because one of them made a misrepresentation. In *Parbury's case (a)* it was held, that "it is not sufficient ground for excluding an allottee from the list of contributories to a provisionally registered railway company, that the prospectus of the company contained incorrect and fraudulent statements, in reliance on which he applied for shares, unless it appears that the only other persons interested in the company were the persons who made the fraudulent statements." *Wontner v. Shairp* was the case of an abandoned company, and no question arose as to who were contributories; the *Amazon* case was reversed by the Lords Justices, and there the party had not signed the deed; here, until the deed has been set aside, every party who signed it must be held a contributory. It is said that the company was insolvent at the time, but Mr. *Rowsell*, the secretary, *swears distinctly that it was not*. In one sense, every company is insolvent at its starting, where large preliminary expenses must necessarily be incurred before the deposits and calls have been got in; here the capital not paid up was amply sufficient to pay off all demands, and the company had only to make calls and enforce them. It is said that the business was put an end to, but that is not the effect of the resolutions, which was merely to suspend further expenditure and fresh engagements until further funds had been got in, and certain accounts had been rendered.

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I am of opinion that Mr. *Bell's* name ought not to be on the list of contributories. What I understood to have been decided by *Parbury's case (b)* amounted to this:—

(a) 3 *De G. & Sm.* 43; and *Burnes v. Pennell*, 2 *H. L. Ca.*
see *Dodgson's case*, *Ibid.* 85; *Ber-* 497.
nard's case, 5 *De G. & Sm.* 283; (b) 3 *De G. & Sm.* 43.

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this :—That where certain persons set a project on foot, and by fraudulent misrepresentations a number of persons are induced to become shareholders, and incur liabilities, there, as between those who are equally innocent shareholders, all are liable to contribute towards payment of the debts of the concern ; that is, they are all liable, and their equity lies against those who made such misrepresentations. But it is a new proposition to me, and I think no authority can be found which establishes that persons taking shares are liable in such a case as this ; viz., where a company having been formed *bonâ fide* to carry into effect a particular project, and it has become obvious, from the existence of debts and the absence of funds, that the project will not succeed, and the company is in such a situation that it cannot carry on its affairs, and that no intention of attempting to do so remains, but the only question is, what is the amount of the liabilities of the company, and how they are to be discharged, and that in this state of circumstances the directors, with a view of relieving themselves and the other shareholders from those liabilities and to get other persons to participate in them, issue representations which they know to be false, in order to induce other persons to become shareholders, not for the purpose of carrying on the concern, but really for the purpose of paying a portion of their debts. I am of opinion that persons becoming shareholders, under such circumstances, cannot be compelled to contribute.

Mr. *Selwyn* admitted, that if a company were actually at an end, it would be difficult to hold that parties who were afterwards induced to become shareholders could be called upon to contribute. If the Court were to hold that they could, a company might do that, which this Court will certainly never allow any single individual to do, namely, commit fraud on others in order to relieve themselves

themselves from their liability. I believe no authority can be found for any such thing.

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The only question is, whether this is a case of the description I have stated, and I am of opinion that it is. The state of the case is this :—this company was formed in 1852, with the *bond fide* object of carrying on the business of a life insurance company, but in 1854 the liabilities were found to be so great, that it became necessary to make some arrangement for meeting them and for raising money in order to have a balance at the bankers. It was resolved, on the 30th of *October*, that they would not carry on any more business until they got the accounts from the agents and the premiums due from them. They find themselves with debts exceeding 2,600*l.*, and in such a situation, that they were obliged to make an arrangement with a person to whom they owed a debt of 37*l.* to give him a bill at two months for 50*l.*, in consideration of his forbearing to press his demand. In this state of things, the business being stopped, they issue a prospectus for the issue of fresh shares, and calling on parties to become shareholders, on the ground of the great extension of the business of the company, and stating that they have created an additional capital ; the whole of the statement being absolutely false.

I can understand that shareholders, who possess the means of obtaining information as to the affairs of the company, may be put on inquiry, and be held liable and bound by the knowledge which they might have obtained, but here Mr. *Bell* had no right to see the accounts or books of the company, or to ascertain the balance in the hands of the bankers, except at a general meeting. The company was practically at an end, they had

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had resolved not to carry on further business, and under such circumstances, I am of opinion, that fresh persons could not be called on to bear their losses. The case is very distinct from that suggested by Mr. *Selwyn*, where all the shareholders are in the same situation, and have been all equally misled.

It is suggested, that all companies are, on their establishment, insolvent; but it is not so, they are not insolvent where they have incurred no other liability than by taking offices and engaging servants at salaries which they have sufficient means of paying. But after it has been ascertained that a company, so far as regards the capital subscribed, is in a state of insolvency, when it is ascertained that the business cannot be continued, and it is intended to wind it up; in that case the existing shareholders are bound to bear the burthen of the existing debts, and I am of opinion that the attempt to induce others, by misrepresentations, to bear that burthen is not a course which this Court will sanction, and that it is a case distinct from one where there has been a misrepresentation in the original constitution of the company.

In my opinion none of the class who are in the situation of Mr. *Bell* ought to be made contributories.

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NOTE.—See the observations of the Master of the Rolls in *Holt's case, post*, p. 53, and *Ex parte Ginger, In re the Tipperary Joint-Stock Bank*, 5 Irish Ch. & Com. Law Rep. 174; and *The Deposit and General Life Insurance Company v. Aylcough*, 2 Jur. N. S. 812.

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## DANIELL'S CASE.

*Re "THE UNIVERSAL PROVIDENT LIFE ASSOCIATION."**June 4.*

**A**N order having been made to wind up this company, the official manager applied to have Dr. *Daniell* placed on the list of contributors for 400 shares.

A director of a joint stock company proposed to retire from the company and be released from all liability.

The board assented to this, on his making a loan to the company. He did so, and transferred all his shares to some of the continuing directors. The Court held that the transaction was invalid, and placed his name on the list of contributors for the whole of the shares.

**D**r. *Daniell* was an original director of the association, and also acted as medical adviser to the company. He originally took 200 shares to qualify himself as a director, and he signed the deed in respect of them.

Subsequently, at a meeting of the directors held on the 26th of *October*, 1854, a resolution was passed, "That 2,400 paid up shares be divided equally amongst the promoters of the society, in consideration of the services rendered by them in its formation and management."

**D**r. *Daniell* being one of the promoters, was held by the Court, though he disputed the fact, to have accepted the 200 free shares.

The company fell into difficulties, and at a meeting of the directors, held on the 15th of *February*, 1855, at which Dr. *Daniell* was present, the following arrangement was made, which was entered in the minutes in these terms:—"Dr. *Daniell* having expressed a wish to retire from the company, and be released from all liability,

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liability, it was agreed to allow him to retire, on condition, that he advance 200*l.* on Monday next, receiving the joint and several promissory note of the directors (who signed Mr. *Viner's* (*a*) note), at twelve months' date, and that he advance a further sum of 200*l.*, less the amount of his salary as medical officer and attendances as director (say together 400*l.*), on or before the 30th *March*, for twelve months from that date, such loans to bear interest at 5*l.* per cent."

This minute was signed by Dr. *Daniell* and the chairman. The money was advanced by Dr. *Daniell*, the promissory notes given, and Dr. *Daniell's* 400 shares were transferred by him to four of the directors, 250 being transferred to one, and fifty each to three others.

The case was adjourned into Court from Chambers.

Mr. *Selwyn* and Mr. *Beavan*, for the official manager. Dr. *Daniell* ought to be placed on the list for the 400 shares; he accepted them, and no valid transfer of them has ever been made. Although he was not present at the meeting of the directors on the 26th of *October*, 1854, he attended at the next meeting on the 2nd of *November*, when the resolution at the prior meeting was read and confirmed, and the transfer of the shares by him is evidence of his acceptance of them; *Urch v. Walker* (*b*).

The arrangement between him and the other directors was not binding on the body of shareholders, for the deed of settlement gave no power to the directors to purchase

(*a*) A director who had retired under similar circumstances. (*b*) 3 *Myl. & Craig*, 702.

purchase shares, or to compromise the liabilities of a shareholder; besides this, Dr. *Daniell*, being himself a trustee for the company, could not enter into such an arrangement for his own benefit. It is evident that the affairs of the company were in a declining state, and that the object of Dr. *Daniell* was to get rid of his liability. The case is the same as *Morgan's* case (*a*); *Lawes's* case (*b*); and *In re Cameron's Coalbrook, &c. Railway Company* (*c*).

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**Mr. Batten** for Dr. *Daniell*. As to the 200 paid up shares, the arrangement was invalid, Dr. *Daniell* never accepted those shares, and never became a shareholder in respect of them.

Secondly, there was an effectual transfer made by Dr. *Daniell* in the company's books, and the transferees ought to be placed on the list in the first instance, for they are bound to indemnify him. The transfer was not invalid; *Cockburn's* case, *In re The Royal Bank of Australia* (*d*). In *Cameron's* case (*e*), the Court seems to have thought, that a shareholder might transfer his shares to the directors on payment of a sum of money, if done *bonâ fide*. The observation made in that case was this:—"Now, without expressing an opinion on the subject, I assume, that the dissentient shareholders, in this case, might properly have transferred these shares to one or more of their directors, upon payment of the sum of 9,000*l.*, provided those directors were *bonâ fide* of opinion, that this transaction was one, by which the company would be really and effectually

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| ( <i>a</i> ) 1 <i>M. &amp; Gor.</i> 225, and 1 <i>Hull &amp; Tw.</i> 320. | and 18 <i>Beav.</i> 339.                   |
| ( <i>b</i> ) 1 <i>De G., M. &amp; G.</i> 421.                             | ( <i>d</i> ) 4 <i>De G. &amp; Sm.</i> 177. |
| ( <i>c</i> ) 5 <i>De G., M. &amp; G.</i> 284,                             | ( <i>e</i> ) 18 <i>Beav.</i> p. 350.       |

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effectually benefited; and I also assume, that if the directors had afterwards applied the 9,000*l. bona fide*, in such manner as they thought most for the benefit of the company, the shareholders could not have impeached the transaction as against the retiring shareholders, whatever might have been their rights as against the directors."

The object was to get rid of the liability, but it was equally the object to impose it on the directors, to whom the transfer was made, and they therefore, and not Dr. *Daniell*, are primarily liable.

*The MASTER of the ROLLS.*

I am of opinion, that Dr. *Daniell* is a contributory on the first list for the whole 200 shares. With regard to the facts as to the second 200 shares, the matter stands thus:—it was agreed and resolved, that 2,400 paid-up shares be divided amongst the promoters of the company, and he was one. He attended the meeting of the directors on the 2nd of *November*, which confirmed the previous arrangement, and did not object to taking his 200 shares; he acts on it afterwards, for he actually obtains certificates for twenty of them, and afterwards transfers the whole 200 to other persons. This proves, by his own admission, that he was owner of these 200 shares, and he cannot now dispute it.

The next question is, has he got rid of his liability? that question affects both the 200 original and the 200 additional shares. The way he professes to have got rid of his liability is as follows:—on the 15th of *February*, 1855, he expressed a wish to retire and be released from his liability, and he makes a proposal to the directors to that effect. The directors say, “we will allow

allow you to retire provided you will advance 400*l.*, which we will repay you and secure by our promissory notes." There was no proposal to transfer these particular shares to other persons who required them, no offer to particular individuals to take or buy the shares, so as to transfer the liability, but a mere proposal to get rid of the liability on them.

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The transaction was clearly a surrender of his shares to the company, and nothing more than making a loan of 400*l.* to the company as the price for relieving him from his liability generally. And this was accordingly effected by a transfer to the directors. There is nothing in the deed to authorize it, and it, therefore, cannot bind contributories. It comes near *Morgan's case (a)*, which is one of the same species, in which it was held, that such a transfer to directors does not discharge a person from his liability.

He transfers all his 400 shares to the directors in different proportions, and they gave him promissory notes for the money which he advanced. This was a transfer to the directors, not on a purchase made by them, but as a mode of carrying into effect the arrangement. Dr. *Daniell* himself well knew, that it was done for the purpose of benefiting him, and to enable him to get rid of his liabilities, and not with a view of making an ordinary and *bonâ fide* transfer from one shareholder to another.

In that view of the case, I am of opinion, that he is a contributory.

(a) 1 *Mac. & Gor.* 225, and 1 *Hall & Twells*, 320.

NOTE.—Dr. *Daniell* appealed to the Lords Justices, but after their decision in *Munt's case (post, p. 58, n.)*, he withdrew his appeal.

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HOLTS CASE.

Re "THE UNIVERSAL PROVIDENT LIFE ASSOCIATION."

June 9.

A. B. became a shareholder and director of a company, on the representations of one of the directors, that it was in a flourishing condition, whereas it was on the verge of insolvency. Held, that the misrepresentation did not relieve A. B. from being a contributory.

THE question was, whether Mr. *Holt* was a contributory in this company, which had been ordered to be wound up. The deed of settlement was dated the 23rd of *February*, 1853. In 1854, the company were in pecuniary difficulties, and on the 27th of *September*, 1854, the directors came to a resolution, "that until shares shall have been sold or money obtained to the extent of, at least, 500*l.*, and that amount paid into the bankers, it is not desirable that a further expenditure be made by the company."

In *September*, or early in *October*, 1854, Mr. *Holt* agreed to become a director, and took the 200 shares necessary for his qualification. He took his seat at the board on the 5th of *October*, 1854, and signed the deed, and he afterwards attended on the 12th of *October*, and on the 2nd, 9th and 16th of *November*, 1854. On the 30th of *October*, 1854, at which Mr. *Holt* was not present, it was resolved, "that a letter be written to the whole of the agencies who are indebted to the society to send up forthwith their accounts and the premiums due from them to the 31st of *October*, inclusive, pending which, it is desirable not to incur any fresh outlay or to enter into any fresh engagements."

At the meetings of directors on the 5th of *October* and the 4th of *November*, at both of which Mr. *Holt* was

was present, the minutes of the former meetings on the 27th of *September* and the 30th of *October* were read and confirmed.

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He resigned on the 16th of *November*, 1854, and with a penknife erased his name from the company's deed.

In opposition, Mr. *Holt*, in his affidavit, stated, that in *September* or *October*, 1854, the managing director of the company had solicited him to become a director, giving him a prospectus and making certain representations to him as to the flourishing condition of the company, and that the payment of 50*l.* would qualify him to become a director. That he consented, believing such representations, and signed the deed on the 5th of *October*, 1854, at the board meeting which he then attended, when he inquired as to the state of the finances of the company. His affidavit proceeded as follows:—"That the next board meeting which I attended was on the 12th day of *October*, 1854, when the accounts were required by me, but were not forthcoming, and I again attended on the 2nd day of *November*, 1854, when, in consequence of the said accounts not being forthcoming, a special meeting was resolved on, to inquire into the finances of the company, and at the next board meeting, on the 9th day of *November*, 1854, I discovered, that, instead of the company being in a flourishing condition, it was heavily in debt, and with little or no assets, and as appears by the cash book of the company having only a balance of 72*l.* 10*s.* 3*d.* in hand. And, on the 16th day of *November*, 1854, having discovered that the representations of the directors of the company, by their prospectus, was false, and that the directors of the company well knew it, I personally tendered my resignation, when I was required to make such resig-

1856. HOLT'S CASE. nation in writing, which I did on the 16th day of November, 1854."

His affidavit also contained the following passage:—

"That by a statement of accounts of the company to the 31st of *December*, 1853, it is there represented, that the money received on the deposit on shares only amounted to the sum of 497*l.* 11*s.* 8*d.*, which would be deposits on shares not exceeding 1,991 shares, leaving a deficit of 859 shares not paid upon.

"That by a minute of the proceedings of the board of directors on the 1st day of *December*, 1853, it appears, that the company was deficient in assets to the amount of 824*l.* 5*s.* 6*d.*

"That by minutes of the proceedings of the said company it appears, that between the 19th day of *January*, 1854, and the 11th day of *May*, 1854, the company had borrowed of the *Protector Insurance Office* 97*5l.*, and of the *United Kingdom Office* 35*lv.*, and that they had also given a bond to *Daniel B. Haddon, John Purcell* and *Algeron Sidney Pendlebury* for 43*lv.*, making the company in debt in respect of bond debts 1,755*l.* That on the 31st day of *August*, 1854, the first instalment due to the *Protector* became due, and that it was proposed that a sum of 2*lv.* should be obtained from each director, in order to pay the same, and that on the 21st day of *September*, 1854, a letter had been received by the said company from the *Protector Life Office* relative to the first instalment being unpaid, and on the 27th day of *September*, 1854, a resolution was passed, that each shares be sold or money received to the amount of 3*lv.*, and that paid into the banker's hands,

it was not desirable further expenditure should be made.

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"That the secretary had laid a statement of the assets and liabilities of the said company before the board to the 29th day of *September*, 1854, and shares; and that by such statement it appears, that the said company was in debt for tradesmen's accounts 589*l.* 14*s.*, for salaries 463*l.* 19*s.* 6*d.*, for loans by directors 155*l.*, and for bond debts 1,434*l.* 7*s.* 1*d.*, making in all 2,643*l.* 0*s.* 7*d.*, and that by the cash book of the said company it appears, that the said company had only a cash balance on the said 29th day of *September*, 1854, of the sum of 48*l.* 19*s.* 3*d.*, and to have that balance, some of the directors had advanced the company the sum of 105*l.* on the 28th day of *September*, 1854, and that on the 30th day of *October*, 1854, it appears by the said cash book, that the said company had only a balance of 72*l.* 10*s.* 3*d.*, and to have that balance an advance had been made to the said company by Mr. *William Pagden*, their solicitor, of the sum of 22*l.* 16*s.* 5*d.*"

In answer to this, Mr. *Rowsell*, who had been secretary and afterwards financial director of the company, in his affidavit, stated as follows:—"I well knew the position of the company at the time of Mr. *Holt's* joining it, and the temporary pecuniary difficulties of the company arose entirely from the unwillingness of the directors to make a call upon the members, so soon after the establishment of the company, especially as at such time, and previously, the income of the company had been increasing, and there was every prospect of the company's ultimate success. If a call had been made upon the members, according to the powers of the deed

1856. *Holt's Case.* of settlement, and enforced, ample assets could have been easily obtained for the payment of all the liabilities of the company.

“The loans referred to by Mr. *Holt* were loans raised by the directors on their own personal responsibility, for the purpose of avoiding the necessity of a call, and such directors, I believe, incurred such responsibility, in full confidence that the income of the company would shortly be such as to release it from all difficulties, and that it had every prospect of success.

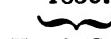
“The resolution passed at a board meeting on the 27th day of *September*, 1854, to the effect, that until shares be sold, or money obtained to the amount of 500*l.*, and that paid into the banker's hands, it was not desirable further expenditure should be made, had reference solely to, and was passed in consequence of, an increased expenditure proposed by the managing director, which it was considered undesirable to adopt.

“The said company continued to carry on business, and accepted assurances on lives and granted policies up to *October*, 1855, and ultimately sold its business to the *Beacon Assurance Company*, for a sum amounting to nearly 1,000*l.*, which was paid to the directors of the *Universal Provident Life Association* by the said *Beacon Assurance Company*, and such business is now carried on by the said last-mentioned company.”

Mr. *Beavan*, for the official manager. Mr. *Holt* is the owner of the shares, and has executed the deed by which he has covenanted to pay; he is therefore a contributory. The misrepresentation of an individual, unauthorized by the body, cannot release him from the obligation

obligation he has contracted towards the other shareholders. *Bell's* case has no application.

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Mr. Roxburgh, *contrad.* The case is governed by the principle laid down in *Bell's* case (*a*). The company was insolvent, and Mr. Holt by misrepresentations has been brought into the concern, merely with a view of making him participate in the liabilities of an insolvent company. This was a mere device by some of the directors of the company, to substitute *Holt's* responsibility for their own.

The Master of the Rolls.

I am of opinion that *Holt* is a contributory, and I think that there has been some misapprehension as to my decision in *Bell's* case (*a*).

In this case, assuming that all which *Holt* states is correct, and that he was induced by the misrepresentations of one of the directors to become a director and shareholder in this company, though it is possible he may be able to sustain an action against the director who so deceived him, yet, as between him and all other innocent members, they have a right of contribution against him.

The grounds of my decision in *Bell's* case were these: —there, after the company had suspended business, and was known by all the persons concerned in it to be in an insolvent state, circulars were issued as the act of the company, containing misrepresentations and offering advantages to canvassers for obtaining other persons to become shareholders. I thought that this was a fraud committed

(*a*) *Ante*, p. 35.

1856. committed by the company to induce the public to share in their losses; that it was the act of the whole company and of all the shareholders, and I thought that persons brought into the company under such circumstances, that is, by an act emanating from the whole body in its *quasi* corporate character, were not liable to be made contributories, to diminish the burthen of the liabilities which the company had incurred. But if, upon the establishment of a company, one man says to another, this is a thriving and prosperous concern, though that statement may be false altogether, and though the person who hears it is deceived thereby and induced to join it, still he becomes a contributory. In the one case it is the act of the company, in the other it is the act of a particular individual: but in neither case can the party committing the fraud obtain any benefit thereby. In the former case this is prevented by declaring that the persons deceived are not thereby made contributories; in the latter, by enabling the person deceived to enforce his personal remedy against the man who deceived him.

HOLT'S CASE.

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 MUNT'S CASE.

### MUNT'S CASE.

#### *In re THE UNIVERSAL PROVIDENT LIFE ASSOCIATION.*

*July 19.*

**I**N this case, an order had been made for winding up this company, and the question was, whether Mr. *Munt* was or was not to be placed on the list of contributors for 200 shares.

Mr. *Munt* was a director of the company, and signed the deed of settlement in respect of 200 shares, but he contended that he had transferred his shares, and had thereby got rid of his liability. It appeared that in December, 1854, there was a difference of opinion between two parties in the direction, as to the conduct of the affairs of the company, *Munt's* party taking one view of the course to be adopted in the management of the concern, and the other party taking a different view. Mr. *Munt* thereupon proposed, that one of these two sections of directors should retire therefrom, and on behalf of himself and those of his party, "to take the management of the company, and relieve the other party of directors from all liabilities connected therewith, and to return all monies paid in shares," or that the other party should retire on the same terms.

There being a disagreement between two sections of directors of a joint stock company, it was agreed, that one section should retire, and transfer their shares to the continuing directors. The shares were transferred accordingly, and were afterwards again transferred, and, at the date of the winding-up order, stood in the names of other persons. The Court held, that the first arrangement was invalid, and that the retiring directors were still contributors, notwithstanding the subsequent transfers.

*Munt* and six other directors accordingly retired, and a written agreement was, on the 18th of March, 1854, entered into, between the continuing directors of the one part and the seceding directors on the other, by which the latter relinquished and released, "*in favour of the association,*" all their rights and interests in the associa-

tion,

1856. *Munt's Case.* tion, and the continuing directors entered into certain covenants to transfer the shares of the latter to the names of the former, and further indemnity.

*Munt* accordingly transferred 200 shares to *Ayers* and the other continuing directors, who, in *May*, 1854, transferred them, with a number of other shares, to *Simmons* (a director), who, in *August*, 1854, transferred them to *Bevan*, in whose name they still remained.

The principal question was, whether the purchase of *Munt's* shares was made on behalf of the company, or by the continuing directors individually, but the Court came to the conclusion, that the purchase was made by the continuing directors on behalf of the company. It is, therefore, unnecessary to state the evidence on which the Court came to that conclusion.

*Mr. Selwyn* and *Mr. Beavan*, for the official manager, contended that *Munt* ought to be placed on the list for the 200 shares, for the purchase and transfer to the directors on behalf of the company were invalid and ineffectual, being authorized by no power contained in the deed of settlement of the company. They cited *Morgan's* case (*a*); *Lawes's* case (*b*).

*Mr. Lee*, *Mr. Lloyd* and *Mr. Roxburgh*, contra. The purchase was made by the continuing directors individually, and not by them as representing the company, and by the agreement of the 18th of *March*, 1854, they pledged their personal liability for the performance of the stipulations contained in it. The invalidity of the transaction as regards the company did not relieve them from that obligation.

Secondly,

- (*a*) 1 *Mac. & G.* 225, and 1 *Hall & Tw.* 320.
- (*b*) 1 *De G., M. & G.* 421.

Secondly, there was a transfer, first, from *Munt* to *Ayers*, and by him to strangers (a), and the persons in whose names the shares at present stand, and not *Munt*, ought, therefore, to be held to be the contributories. If the original transaction be void as against the company, then *Ayers*, who was the trustee or agent of *Munt*, has made a valid transfer of these particular shares. *Munt* now adopts that transfer as his act, and whatever might be the effect of the first transaction, the subsequent transfers at least were valid, and make the persons now on the register clearly liable, and there cannot be double contributories for the same shares.

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*MUNT'S CASE.*

*The MASTER of the ROLLS*, having decided that the transfer had been made to the directors as representing the company, and not to the individuals, proceeded as follows :—

Then, with regard to the argument of Mr. *Lloyd*, that there has been a subsequent transfer by Mr. *Ayers*, who must be treated as the trustee and agent for Mr. *Munt*, the observation I make on that is, that this is not the nature and character of the transaction, but even if it were, I must consider the validity of the original transaction as between Mr. *Munt* and the general body of the shareholders of the company, for I am not now disposing of or determining any question which may arise individually as between Mr. *Munt* and Mr. *Ayers*, if any such should arise out of these transactions.

The consequence is, that, looking at this transaction in every point of view, and attending very carefully to

(a) It was supposed and stated to the Court, that the transfers had been made to strangers. The Court here and upon appeal acted on that assumption, but the fact

was, that these transfers were merely made to the successive managing directors, and not to strangers.

1856. *Munt's Case.* to what Counsel have urged before me, and who certainly have put the case in every light in which I believe that it can be presented, I think that this was a transaction which was, and was known by the parties to it to be, a purchase of shares by a set of remaining directors from directors who intended to retire from the direction, on behalf of the company, and to form part of the stock of shares in the company: and that this was an essential part of the transaction. So viewing the case, it comes within that class of cases which I had to consider in the instance of Dr. *Daniel*, and which decides that such a transaction is void. Mr. *Munt* is, therefore, properly made a contributory. The same observation, of course, will apply to all the other shareholders who stand in the same situation.

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NOTE.—Mr. *Munt* appealed to the *Lords Justices*, when

Mr. *Lee*, Mr. *Lloyd* and Mr. *Roxburgh* again argued, that even if the first transfer were void, the second and third were valid. That Mr. *Munt* now adopted the subsequent transfers, and that all the liabilities followed and attached to the present registered shareholders.

Mr. *Selwyn* and Mr. *Beavan, contrð*, were not called on by

The *Lords Justices*, who held, that there had not been a *boná fide* transfer of the shares; and Lord Justice *Turner* said, "as to the argument that the subsequent transfers were now adopted by *Munt* it would be to adopt a transaction not binding on the shareholders."

The appeal was dismissed with costs.—Aug. 1, 1856.

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## WICH v. PARKER.

*April 7, 12.*

**A**CCORDING to the statements of the bill, *William Parker* was entitled to some property under the marriage settlement of his parents.

The Plaintiff alleged, that in *January*, 1853, the insolvent had accepted a draft for 166*l.* 10*s.* for some goods he then purchased, and that, when the draft became payable in *March*, 1853, it was dishonoured. An action was brought by the holder in *June*, 1853, and judgment obtained, and he was arrested thereon in *June*, 1854.

In *July*, 1855, he petitioned for the benefit of the Insolvent Act, and he was discharged under it in the following year, and the Plaintiff was appointed his assignee.

The bill alleged, that in the mean time, and on the 19th of *February*, 1853, *William Parker* assigned all his interest, under the marriage settlement, to his sister *Matilda Parker*, nominally in consideration of 120*l.* due and 10*l.* cash.

The Plaintiff insisted, that this assignment was fraudulent and void, and he filed this bill against *William Parker* and *Matilda Parker* for the purpose of setting it aside. The bill alleged, that the property included in the conveyance of the 19th of *February*, 1853, was

"the

bill. The Court came to the conclusion, that the two bills were substantially the same, and the answer to the first being deemed sufficient, the Defendant was not bound to answer the second.

To a bill to set aside a conveyance as fraudulent, under the statute of *Elizabeth*, the Defendant, by his answer, refused to answer any portion of it, on the ground that the statute imposed a forfeiture and six months' imprisonment. After the time for excepting had expired, the Plaintiff amended his bill, by striking out the allegations of fraud, and by attempting to remove the objection, and he again filed the interrogatories. The Defendant, by answer, again insisted on the objection, and that the proceeding of the Plaintiff was a mere snare, and he refused to answer any portion of the

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"the only valuable property of any kind to which he was entitled, and independently thereof he was or would have been wholly insolvent."

The bill charged, that the assignment to *Matilda Parker* was a "*fraudulent contrivance, on the part of the Defendants, to deprive the creditors of William Parker of the property comprised therein, and that no consideration, or, if any, a [very insufficient, or] merely colourable consideration was given by Matilda Parker to William Parker for the execution thereof, and that the several sums of 120*l.* and 10*l.* were not, in fact, advanced and lent to William Parker by Matilda Parker at the time alleged, and that such sums, if any, as were in fact advanced by her to William Parker, previously to the 19th day of February, 1853, or the greater part thereof, were a gift and not a loan, and that no security was ever given for the same, and that no interest was ever paid thereon, and that there was, in fact, nothing, or a very trifling sum, due from William Parker to Matilda Parker on such 19th day of February, 1853; and that the said deeds of conveyance and assignment, dated the 19th day of February, 1853, would not, in fact, have been executed, but for the actual or impending or anticipated insolvency of the said William Parker.*"

The bill prayed, that the deed might be declared *fraudulent* and void, and that the property therein comprised was vested in the Plaintiff as assignee of the insolvent.

The Plaintiff filed interrogatories corresponding to the several statements in the bill, which he required the Defendants to answer.

*William Parker* put in an answer in the following words:—

words :—"I say, that by an Act, passed in the thirteenth year of the reign of her majesty Queen *Elizabeth*, chap. 5 (a), intituled 'An Act against Fraudulent Deeds, Alienations, &c.', it is enacted as therein mentioned ; and to the terms of which said Act, to avoid prolixity, I crave leave to refer ; and I am advised and believe, that the Plaintiff, by his said bill, seeks discovery in respect of a matter, which, if true, would render me liable to penalties and forfeitures, and would subject me to a criminal prosecution under the said statute ; and I humbly insist, that I am not bound to answer, and I decline to answer any of the interrogatories filed by the Plaintiff in this suit." He then disclaimed all interest and insisted that he had improperly been made a party to this suit.

The Plaintiff took no exceptions to this answer, but having allowed the time to except expire, he amended his bill, by striking out the words printed in italics and inserting those within brackets, and omitted the word "fraudulent" in the prayer. The thirty-fifth paragraph introduced by amendment into the bill was as follows :—"And the Plaintiff charges, that the Defendant *William Parker* and *Matilda Parker* respectively allege, and it may be true for anything Plaintiff knows to the contrary, that neither the indenture of the 19th day of *February*, 1853, nor any other matter hereinafter charged or stated, were executed or done by the said Defendants, in such manner, or with such intention,

(a) The 13 *Eliz.* c. 5, s. 3, enacts, that every party to such fraudulent conveyance "shall incur the penalty and forfeiture of one year's value of the said lands," and "the whole of the value of the said goods," and "also, being thereof lawfully convicted, shall suffer imprisonment for one-half

year, without bail or mainprize." There is a similar clause in the 27 *Eliz.* c. 4, namely, sect. 3. See 2 *Chitty's Statutes*, 163, 169.

It seems strange, that the objection in the text does not appear to have been taken in the numerous similar cases which have come before the Court.

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tion, or under such circumstances, as to expose the said Defendants, or either of them, to any pains or penalties, or to any criminal prosecution under the statute against Fraudulent Deeds, Alienations, &c. or otherwise."

He then filed a second set of interrogatories which was a mere copy of the first.

*William Parker*, in answer to these second interrogatories, stated as follows :—"I say, that for the reasons set forth in my former answer, I declined to answer the interrogatories filed by the Plaintiff, and the Plaintiff submitted to and acquiesced in my said objection, and I say, that the Plaintiff has amended his said bill by striking out certain allegations therein, and has improperly, as I submit, filed a second set of interrogatories to the same purport and effect as the former, which he has, by his conduct, admitted I am not bound to answer. And I say, I believe that the amendment and proceedings of said Plaintiff are a mere snare, intended to obtain from me an answer to matters to which he is not entitled, he, the Plaintiff, still, as I believe, insisting, as he has always insisted, that the deed is a fraudulent contrivance to defeat my creditors. And I am advised and believe, that I am not bound to answer the said interrogatories or any of them, and that an answer to the said interrogatories, or any of them, might tend to subject me to the penalties and forfeitures referred to in my former answer. And I humbly insist, that I am not bound to answer, and I decline to answer, any of the interrogatories filed by Plaintiff in this suit."

*Matilda Parker* put in two similar answers (omitting the disclaimer) to the original and amended bill, and she insisted on the validity of the deed of the 19th of February, 1853. The Plaintiff took twenty-four exceptions

tions to each answer, which now came on for argument together.

Mr. *Rendall*, in support of the exceptions. The Defendants refuse to answer any portion of the bill; if they are right, it must be open to a general demurrer. They ought, therefore, to have demurred, but having undertaken to answer, they are bound to answer fully (a). It will be said, that by the 38th Order of *August*, 1841 (b), the Defendants may, by answer, protect themselves from giving the discovery; but it is settled, after some difference of opinion, that this Order does not apply where the objection goes to the whole bill; *Fairthorne v. Weston* (c); *Kaye v. Wall* (d), reversed by *Mason v. Wake-man* (e), in which it was held, that a Defendant cannot under the 38th Order of *August*, 1841, decline to answer any interrogatory merely on the ground that the bill is open to a general demurrer.

Secondly. A substantially new case is made by the amendments, and the objection arising from the statute of *Elizabeth* has been removed. The Defendants, therefore, cannot now say, that the penalties imposed by that statute relieve them from discovery; *Mazarredo v. Maitland* (f).

Thirdly. There are parts of the amended bill and of the interrogatories which are new, and some of the interrogatories are now varied in form. These, at least, the Defendants must answer; *Att.-Gen. v. Rees* (g).

Mr.

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|------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|
| (a) The cases and the exceptions to the rule are stated in 1<br><i>Hovenden's Supp. to Vesey</i> , p. 126. | (d) 4 <i>Hare</i> , 127.<br>(e) 2 <i>Phillips</i> , 516.<br>(f) 3 <i>Mad.</i> 66.<br>(g) 12 <i>Beav.</i> 50. |
| (b) <i>Ordines Can.</i> 175.<br>(c) 3 <i>Hare</i> , 387.                                                   |                                                                                                              |

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**Mr. R. Palmer** and Mr. **Beavan**, for **Matilda Parker**, and Mr. **Selwyn**, for **William Parker**. By the statute of 13 *Eliz.* c. 5, pecuniary penalties and six months' imprisonment are imposed on parties to fraudulent conveyances (*a*). The Defendant cannot, therefore, be compelled to answer questions which in the result may subject him to a criminal prosecution. Secondly, the bill is not demurrable; it states a case which, if true, would entitle the Plaintiff to a decree, and therefore the 38th General Order is applicable. Independent of this, it has been decided by Vice-Chancellor **Knight Bruce**, in *Short v. Mercier* (*b*), that the proper mode of raising the present objection is by answer, and it may be raised at any stage of a cause (*c*); The *Queen v. Garbett*, cited in *Fisher v. Ronalds* (*d*); for at no time and by no process can a party be compelled to criminate himself. Thirdly, there is no new case raised by the amendments; they are merely colourable, and intended to evade the rule, and the facts and the prayer of the bill are in substance the same. The Plaintiff is bound to separate that to which he is entitled to an answer from that which he is not; The Earl of *Lichfield v. Bond* (*e*); and the Defendant is not bound to answer any one of a chain of facts which may subject him to penalties; *Lee v. Read* (*f*); and see *Short v. Mercier* (*g*). If on these amendments the Plaintiff could enforce an answer, he might immediately after amend the bill, and restore it to its original state, thus by indirect means subjecting the Defendants to penalties. But the Plaintiff cannot deprive a Defendant of his right to protection by stating his case untruly; *Short v. Mercier*.

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|---------------------------------------------------------------------------------------|--------------------------------------------|
| ( <i>a</i> ) The statute of 27 <i>Eliz.</i> c. 4, has a clause with the same penalty. | ( <i>d</i> ) 12 C. B. Rep. 764.            |
| ( <i>b</i> ) 2 <i>De Gex &amp; Sm.</i> 635.                                           | ( <i>e</i> ) 6 <i>Beav.</i> 88.            |
| ( <i>c</i> ) See 19 <i>Vesey</i> , 225.                                               | ( <i>f</i> ) 5 <i>Beav.</i> 381.           |
|                                                                                       | ( <i>g</i> ) 3 <i>Muc. &amp; Gor.</i> 205. |

*Mercier*(a). Fourthly, the Plaintiff not having taken exception to the first answer, it must be deemed to be sufficient, 18th General Order of November, 1850(b); and when an answer is sufficient and the bill is amended, the Plaintiff cannot again sustain exceptions on the old matters; *Duncombe v. Davis*(c); for the answer must still be deemed to be sufficient. Fifthly, as far as *William Parker* is concerned, the discovery is immaterial, for he has disclaimed.

*Mitchell v. Koecker*(d) and *Mitford's Pl.*(e) were also cited.

Mr. *Rendall*, in reply.

*The Master of the Rolls* reserved judgment.

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*The Master of the Rolls.*

*April 12.*

The question is, whether the exceptions are to be allowed to the answer of the Defendants.

The original bill prayed a declaration that a deed, dated the 19th of *February*, 1853, and executed by the Defendants, might be declared to be fraudulent and void, as contrary to the statute of 13 *Eliz.* c. 5, being intended to defeat or delay creditors. No demurrer was filed, but answers were put in by the first two Defendants, who were both parties to the deed, which, though in title and form are answers, were in substance no answer.

By

(a) 2 *De G. & Sm.* 649.

(d) 11 *Beav.* 380.

(b) *Ordines Can.* 436.

(c) *Page* 229 (5th Ed.).

(c) 1 *Hare*, 184.

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By them they insisted, that by reason of the 3rd clause of the Act, by which persons, parties to such conveyances, were made liable to six months' imprisonment and the loss of one year's income, they were not bound to answer any part of the bill. Upon this, the Plaintiff, without filing exceptions, submitted and amended his bill, by striking out the words "fraud" and "fraudulent" throughout, and striking out most of the passages containing them, and also several passages which impute the motive for the executing the deed, namely, the anticipated insolvency of the Defendant *William Parker*.

In answer to this amended bill, the Defendants put in, what, again, is in title and form an answer, but, in substance, is no answer, insisting on the same objection which they had relied on by the former answer, and also insisting, that the answer to the former bill having been submitted to, it must be treated to have been sufficient, and that the Plaintiff cannot require fresh answers to these interrogatories on the principle of *Ovey v. Leighton* (a).

I do not enter into the question whether the Defendants could successfully have resisted answering the original bill, if the Plaintiff had excepted, for I am of opinion that I have not now to consider, whether the Defendants could, with propriety, refuse to answer the original bill. It was contended on behalf of the Plaintiff, that the question was the same as that which was decided by Sir *James Wigram* and reversed by Lord *Cottenham*, that a Defendant could not, by alleging that a bill is such that the plaintiff is entitled to no relief, resist answering it, but having submitted to answer,

(a) 2 Sim. & St. 234.

answer, he must answer fully. I concur in this:— that a Defendant cannot generally take that course, though there are exceptions to that rule; but the question is, whether that is the case here, or whether the amended bill is not, substantially, the same as the original bill. The Plaintiff strikes out the words "fraud" and "fraudulent," and the passages which impute a motive, and introduces this passage:—[*His Honor read the 35th paragraph of the amended bill(a).*]. In my opinion that does not alter the case, which substantially is the same. It is not by using the words "fraud" and "fraudulent" alone, that the case may be rendered obnoxious to the statute, but you must look at the facts alleged, and from them determine whether they are such as this Court considers fraudulent, and would invalidate the deed. You must see whether the facts alleged lead to that inference; and if they do, the allegation that it is fraudulent is immaterial. It is alleged that the deed was executed without consideration by *William Parker*, who was about to become insolvent, and under circumstances sufficient to shew that the deed was fraudulent under the statute.

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Either it is a fraudulent deed under the statute or the complaint amounts to nothing. I am of opinion, that the amended bill is substantially the same as the original bill, and the question is, whether an answer having been put in to the original bill, the Defendant is entitled to say, "you are not entitled to require me to answer over again the amended bill, which in substance has been answered by answering the original bill," in this sense, that the Plaintiff has taken it as a sufficient answer. *Ovey v. Leighton (b)* cannot be distinguished from this case,

(a) See ante, p. 58. (b) 2 Sim. & St. 234.

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case, it is in substance the same. There the Defendant had protected himself from setting out the title deeds, on the ground that he was a purchaser for valuable consideration. The Plaintiff did not take exceptions but amended his bill; and the Vice-Chancellor held two things:—"First, that a purchaser for valuable consideration, submitting to answer and not protecting himself by plea, must answer fully; and, secondly, that the Plaintiff, having waived this exception to the answer to the original bill, could not recur to it on the answer to the amended bill."

The Defendants were either compellable to answer the original bill or not. If they were, the Plaintiff has waived the objection and cannot return to it; but if they were not, then neither are they bound to answer the amended bill.

I think it unnecessary to refer to those cases where the interrogatories in the original and amended bill, though precisely the same in form, have, by the amendment, acquired a different meaning. Thus, if the Plaintiff alleged the execution of a deed of a particular date, and interrogated as to the "said deed," which, being answered, the Plaintiff amends, and alters the date, leaving the interrogatory as before, it is evident that it would refer to a different deed and must be answered. That was the case in *Attorney-General v. Rees* (a), where the subject-matter was altered by the amendments.

I cannot compel an answer to these amendments, and must overrule the exceptions; but this is not an objection which this Court looks at with favour, and I shall not give any costs, but direct them to be costs in the cause.

(a) 12 *Beav.* 50.

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PAYNE v. LITTLE.

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Jan. 15.

THE testator, *William Preest*, died in 1820, and under his will, the Plaintiff, *Mrs. Payne*, was entitled to some annuities.

The annuities were regularly paid by the executors to the end of 1826, and some payments were made irregularly in respect of the annuities down to 1830, but still leaving arrears unpaid. Since that time, nothing had been paid. After the testator's death, several suits were instituted, in one of which, *Payne v. Burridge*, the Master made his report in *July*, 1826, finding a debt due to one *Burridge*, and charged on the testator's estate; and in the suit of *Burridge v. Payne*, instituted to enforce payment of the debt, an order was made, in 1836, for payment of 4,000*l.* into Court by the executors.

Annuities given by a will were regularly paid by the executors for six years, and irregular payments, on account, were made by them for the next four years. *Scumble*, that this of itself would be an admission of assets.

This Court does not bind executors by an admission of assets, if new claims on the estate afterwards arise.

Mrs. Payne instituted this suit in 1848, and sought to make the executors and their representatives *personally* liable, as on an admission of assets, or, in the alternative, for the administration of the estate, charging them for wilful default.

The principal question was, whether the payment of the annuities amounted, under the circumstances, to an admission of assets.

Mr. *Follett* and Mr. *W. Morris*, for the Plaintiff.

Mr.

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*Mr. Lloyd, Mr. Roupell, and Mr. Bagshawe, contra.*

*The MASTER of the ROLLS reserved judgment.*

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*The MASTER of the ROLLS.*

The first question is, whether there is not an admission of assets, which precludes the necessity of taking any of these accounts at all? If the case had stood merely upon the fact, that the annuities had been regularly paid up to 1826 without any question, and afterwards, irregularly, up to 1830, before Mrs. *Payne* took possession of this estate, I should have been much disposed to consider that, as an admission of assets binding on the executors, which would have rendered the necessity of going into the accounts superfluous.

The Court, undoubtedly, holds executors to have made an admission of assets by reason of their payment of sums of money, as well as by an express admission in words. If an executor pays a simple contract debt, that, no doubt, is an admission that he has sufficient assets to pay the specialty debts. But every admission of assets made by an executor, whether it be made by his acts or by an express admission in words, must have reference to the circumstances which he was then acquainted with, and if "the circumstances on which he built his admission fail" him (which is an expression used by Sir *John Strange*, in *Horsley v. Chaloner* (a)), then the admission fails also, and he cannot be bound by an admission made under circumstances with which he was not acquainted. He might have

known

(a) 2 *Ves. sen.* 83.

known nothing whatever of a debt due by the testator; a liability might exist against the estate of the testator in respect of which a debt had not even arisen, as under a covenant entered into by the testator, where no breach might have taken place until long after his death ; so, for instance, if the testator had become surety for another person for the performing the covenants in a lease and the like. Under such circumstances, if a debt afterwards arose, which the executor was not previously aware of, his admission of assets before that time cannot in any respect bind him, or amount to this declaration on his part :—"that whatever liability may hereafter arise against the testator's estate, and of which I now know nothing, I am content to be bound personally to pay everything which was left by the testator's will."

The circumstances with which the executors were not acquainted at the time they paid the Plaintiff's annuity are those which occurred in the subsequent suits of *Payne v. Preest*, but, above all, in that of *Payne v. Burridge*, in which, after the payments had been made of the Plaintiff's annuity, the Master's report was made, finding a large sum of money due from Mr. *Preest's* estate, and which constituted a debt due from it, and, in 1836, an order was made, in the suit of *Burridge v. Payne*, directing the executors to pay 4,000*l.* into Court.

It is impossible, in that state of things, that the executors can be bound by an admission made by them ten years before, they being then perfectly ignorant of what Mr. *Burridge* might be able to establish, and having no means of ascertaining it; for, in fact, the bill of *Burridge v. Payne* was not filed at that time nor was the report; finding that this was a debt due to *Burridge* and charged upon the estate (which was established in the suit of *Payne v. Burridge*) ascertained, until *July, 1826*,

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nor was the order made till *January, 1827*, after which the bill of *Burridge v. Payne* was filed to enforce it.

I am of opinion, therefore, that this admission of assets is not one by which I can bind the executors of the original testator, and it is clear, therefore, that there must be an account.

**NOTE.**—As to the admission of assets as regards legatees, see the following authorities:—*The Corporation of Clergymen's Sons v. Swanson*, 1 *Ves. sen.* 75; *Cook v. Martyn*, 2 *Atk.* 3, and *Mitford*, 41, note; see *Horsley v. Chaloner*, 2 *Ves. sen.* 83; *Dreury v. Thacker*, 3 *Swanst.* 548; *Rogers v. Soulten*, 2 *Keen*, 598; *Whittle v. Henning*, 2 *Beav.* 396; *Att.-Gen. v. Chapman*, 3 *Beav.* 255; *Dinsdale v. Dudding*, 1 *Y. & C. C. C.* 265; *Holland v. Clark*, 2 *Y. & C. C. C.* 319; *Att.-Gen. v. Higham*, *Ibid.* 634; *Barnard v. Pumfrett*, 5 *Myl. & Cr.* 67; *Savage v. Lane*, 6 *Hare*, 32; *Postlethwaite v. Mounsey*, *Ibid.* 33, note; *Lazonby v. Rawson*, 4 *De G., M. & G.* 556; *Severs v. Severs*, 1 *Smale & Gif.* 400; *Clark v. Bates*, 2 *De G. & Sm.* 203.

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May 30.

#### WHITE v. SMALE.

In a bill against *B.* and *C.*, the Plaintiff stated a circumstance, which was material in order to charge *C.*, not positively as a fact, but as an allegation made by *B.* A demurrer by *C.* was allowed.

In a suit on behalf of a number of grantees of rent-charges on the same property, who had powers of distress and entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rent-charges.

*Smale,*

THE bill, in this case, was filed by the Plaintiff, on behalf of himself and all other the grantees of yearly rent-charges of 40s. each, issuing out of certain hereditaments situate on *Hounslow Heath*, against *Robert Smale*, in whom, as the bill alleged, the land and four cottages thereon became vested, on the 30th of *January, 1845*, and by whom, on the same day, the rent-charges in question (about twenty in number) had been granted.

*Smale*, by his answer, stated, that he had sold the property to *William Harry James* prior to the grant of the rent-charges, and that, on completing the purchase, he signed several deeds, the nature and purport of which he did not understand, but supposed they related to the conveyance. The Plaintiff thereupon amended his bill, by making *James* a Defendant. The amended bill, in the allegations as to the sale to *James*, merely stated what *Smale* alleged to be the facts, without technically stating that such were the facts. On this ground, *James* put in a demurrer.

Mr. *Shebbeare*, for the demurrer.

Mr. *R. Palmer* and Mr. *William Morris*, contra.

The MASTER of the ROLLS thought that no case whatever was stated against the Defendant *James*, and that the demurrer must be allowed generally. The bill, he said, simply stated, that somebody alleged that *James* had an interest; but that was not sufficient to sustain the bill. The demurrer must be allowed with costs; but the Plaintiff might have leave to amend.

The bill was accordingly amended, and, on the answers of the Defendants being put in, it appeared that the rent-charges in question had been granted by *Smale* by indentures dated respectively the 30th *January*, 1845, but executed on the 27th of *February*, 1845; and though *Smale* did not, by his answer, admit the execution of those indentures, yet he alleged that, sometime in 1845, he sold the hereditaments to *James*, and executed several indentures relating thereto, of the nature and purport of which he was ignorant, and that he had no longer any interest in the hereditaments, of which he alleged *James* was, and *James* claimed to be, seised, subject to the

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the rent-charges. The Plaintiff thereupon obtained the usual order to dismiss his bill against *Smale*, by reason of his not then having any interest in the subject-matter of the suit.

The bill prayed, that an account might be taken of what was due to the Plaintiff and to the several other grantees, and that the Defendant might be ordered to pay the same and the costs of suits; and in default, that the arrears and costs might be raised by sale or mortgage of the hereditaments; and if by sale, that the residue of the purchase-money might be invested for securing the payment of the rent-charges in future, and that a receiver might be appointed.

It appeared from the evidence, that the cottages were, and had been for a considerable time unoccupied, and the rent-charges of the Plaintiff and the other grantees being in arrear, there was nothing upon the premises upon which a distress could be levied; that the premises were becoming dilapidated and depreciating in value; that no tenants could be found to occupy the cottages, unless protected from and guaranteed against the exercise of the power of distress given to each of the grantees of the rent-charges; and that, by reason of each of the several rent-charges being granted subject to the others of them, none of the grantees could recover or maintain the possession of the hereditaments at law.

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*May 30.*

The Plaintiff now moved for the appointment of a receiver.

Mr. *R. Palmer* and Mr. *William Morris*, in support of the motion, relied upon *Cupit v. Jackson* (*a*).

Mr.

(*a*) 13 *Price*, 721; *M'Clel.* 495.

Mr. *Shebbeare, contra*, insisted that the present state of the property was occasioned by the owners of the rent-charges themselves, who had harassed the tenants by distresses; and he contended that a Court of Equity had no jurisdiction in this case, which was one of purely legal cognizance, the rights being simply legal rights; *Hooper v. Cooke* (a); *Graves v. Hicks* (b). The case, he said, of *Cupit v. Jackson* (c) has been disapproved of, and that if a receiver be appointed, it ought to be without prejudice.

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*The Master of the Rolls.*

I must appoint a receiver to protect the property. I do not prejudice the right of anybody.

- (a) 20 *Beav.* 639, affirmed by (c) 13 *Price*, 721; *M'Clel.*  
the Lords Justices. 495.  
(b) 11 *Simp.* 551.
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LAKEMAN v. The AGUA FRIA GOLD MINING COMPANY.

June 7.
A plea, denying a negative allegation in the bill, is informal.

A. B. employed the Plaintiff to sell a lease, and agreed that he should have one-fourth of the produce for his trouble. It was sold to a joint-stock company for a number of paid-up shares. The company accepted notice of the agreement between *A. B.* and the Plaintiff, and promised to hold the Plaintiff's proportion of the shares at his disposal. Afterwards, *A. B.* sold all the shares to the company, who insisted on retaining the Plaintiff's proportion. The Plaintiff filed a bill

against the company alone, to recover them, stating that they had never been legally vested in *A. B.*, inasmuch as the certificates had never been delivered to him, and that he had never executed the deed of settlement of the company. The Defendants put in a plea for want of parties, denying that *Palmer* "did not execute" the deed, and averring that his name appeared thereto. The plea was overruled.

THE statements of this bill were to the following effect:—

Messrs. *Palmer & Co.*, of *San Francisco*, by indenture dated in *September*, 1850, authorized the Plaintiff to sell a lease of a gold mine in *California*, which belonged to them, and they agreed to pay the Plaintiff one-fourth of the net proceeds of the sale for his services.

The Plaintiff sold the lease to the Defendants, a Mining Company, in consideration of one-third of the whole of the shares in the company (paid up), a moiety of which was to be delivered at once, and the other moiety at the end of three years from the complete registration of the company. The lease was accordingly conveyed in *October*, 1851.

The company was provisionally registered by the name of the "*Agua Fria Gold Mining Company*"; the deed of settlement dated the 6th of *November*, 1851, was executed, and the company was completely registered on the 22nd of *November*, 1851.

The Plaintiff gave notice to the company of his rights, and produced a memorandum of the 23rd of *May*, 1851,

1851, evidencing them. Besides which, Mr. *Walbridge*, (the attorney and agent of Messrs. *Palmer & Co.*), in *February* and *March*, 1852, also gave formal written notice to the directors, of the arrangements between themselves and the Plaintiff, and of his right to one-fourth of the shares agreed to be given for the lease, and he requested the directors to hold such shares at the disposal of the Plaintiff. The company, in writing, accepted the order of Mr. *Walbridge*, to deliver 3,104 shares to the Plaintiff, which were to be delivered immediately, and said they would act upon it. As to the reserved shares, the letter proceeded as follows:—"The board also takes notice, that 3,166 of the reserved shares in their hands are the property of Mr. *Lakeman*, and will be held at his disposal."

The 3,104 shares were accordingly delivered to the Plaintiff, and he executed the deed of settlement in respect of them.

By an indenture of the 15th of *November*, 1852, *Palmer & Co.*, for a money consideration, granted and released to the company all their rights in the whole one-third of the *reserved* shares, the scrip certificates of which remained in the possession of the company. The Plaintiff hearing of this, remonstrated with the directors, who, in answer, stated, that they had "no alternative but to believe that Messrs. *Palmer & Co.* considered themselves at liberty to deal with the whole of their property, including the portion claimed by Mr. *Lakeman*."

At the expiration of the three years from the complete registration of the company, the Plaintiff applied to the company for delivery of 3,166 reserved shares, to which, under the original agreement with Messrs. *Palmer & Co.*, he was entitled. In answer, the company,

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**LAKEMAN v. THE A**

June 7.
A plea, denying a negative allegation in the bill, is informal.

A. B. employed the Plaintiff to sell a lease, and agreed that he should have one-fourth of the produce for his trouble. It was sold to a joint-stock company for number paid-up. The c accept of th me A P

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The MASTER of the ROLLS.

I am of opinion, that the plea cannot be supported. The essence of such a plea could only be, that *Palmer & Co.* claimed the shares. I think this plea cannot be treated as going to that extent, and for this reason:—The Plaintiff claims 3,166 shares in the *Agua Fria Gold Mining Company*, and the bill alleges that those 3,166 shares were part of a larger amount of shares which belonged to *Palmer & Co.*, who transferred them to the Plaintiff, and the Plaintiff seeks to compel the Defendant to deliver over to him the certificate of these shares. If the plea had been that *Palmer & Co.* actually claimed the shares, and had, in substance said, “we, the Defendants, admit that we have no claim to them at all, the only question is one to be determined between the Plaintiff and *Palmer & Co.*; we ought not, therefore, to be vexed by two suits, being mere shareholders, and this being a matter of interpleader,” I should have considered the plea good, and that the Court could not determine the questions in the absence of *Palmer & Co.* I think also, that if the bill had asserted, that *Palmer & Co.* disclaimed an interest in these shares, and the plea had therefore taken issue on that fact, the plea would have been equally good; or even if the company had claimed the shares beneficially, so that there would have been three claimants, and the plea had undertaken to prove, that *Palmer & Co.* did claim a right to these shares, I should still have been of opinion that *Palmer & Co.* were necessary parties to discuss the question. Again, if the plea had been, that *Palmer & Co.* executed the deed of settlement, and that their names were subscribed thereto, and that in respect of such execution, they claimed an interest in these shares, I should have been of opinion that this was a perfectly good plea, and should have allowed

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allowed it ; although, if the truth of the plea were afterwards disproved, a decree would go against the Defendant at once, because they had thought fit to put their equity on the truth of the plea alone.

But, considering this to be a plea that *Palmer & Co.* did execute the deed, and that their names appear subscribed to it, the Court cannot possibly, as a necessary consequence, infer, that *Palmer & Co.* claim an interest in these shares. That fact ought to be distinctly pleaded, for that would be the real question to be decided on these pleadings. It is perfectly possible that they may have executed the deed of settlement, and, according to the provisions of the Joint Stock Acts, be still the legal owners of the shares ; but yet they may have no beneficial interest in them at all. I cannot assume, from this plea, that they claim any beneficial interest.

If the answer, when it comes in, should state that Messrs. *Palmer* claim a beneficial interest in the shares, it will be incumbent on the Plaintiff, at the hearing, to shew, either that Messrs. *Palmer* claim no interest, or, that they are bound in such a manner, that it would be idle to have them here, in order to contest a thing which cannot reasonably be disputed. The statements in this plea are, merely, that the deed was executed by *Palmer & Co.*, and that their names appear to it ; but whether, in respect of those shares, of which they have parted with the beneficial interest, though they may not have parted with the legal interest, does not appear. I think, therefore, that this plea must be overruled.

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## BARTON v. ROCK.

*Jun. 12.  
May 3, 22,  
23, 31.*

A BILL was filed for a Receiver, pending a litigation for probate in the Ecclesiastical Court, and a Receiver was granted on the 26th of November, 1855. On the 2nd of January, 1856, probate was granted to the Defendant, whereupon he moved to discharge the Receiver, and that the Plaintiff might pay the costs of suits ; but,

A suit for a Receiver, pending a litigation for probate in the Ecclesiastical Court, is never brought to a hearing, and therefore cannot be dismissed for want of prosecution ; but, after the litigation is ended in the Ecclesiastical Court, this Court will, on motion, dispose of the costs of the suit.

*The Master of the Rolls held, that he could go no further than discharge the Receiver.*

Mr. T. H. Terrell now moved to dismiss the bill with costs, for want of prosecution. He argued, that, as the Ecclesiastical Court had decided that the Plaintiff was in the wrong, he ought to pay the costs of a suit instituted in this Court without reason.

Mr. J. S. Moore, contrà. Suits of this description are never brought to a hearing ; *Anderson v. Guichard* (a) ; for their object is fulfilled by granting a Receiver. They cannot, therefore, be dismissed for want of prosecution ; *Edwards v. Edwards* (b). Secondly, the matter was disposed of on the last motion, and the Court has now no jurisdiction to give costs.

Mr. Terrell in reply. In *Edwards v. Edwards* (b)  
the

(a) 9 *Hare*, 275<sup>4</sup>

(b) 17 *Jur.* 826.

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the litigation in the Ecclesiastical Court was still pending : here it is at an end.

*The MASTER of the ROLLS.*

I will inquire as to the practice ; but I am clear that I cannot dismiss the bill for want of prosecution. Assuming the suit to have been improperly instituted, is the Court, in that case, to have no jurisdiction to order the Plaintiff to pay the costs ?

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May 31.

*The MASTER of the ROLLS.*

The bill, in this case, was filed on the 5th of November last for a Receiver *pendente lite*. On the 26th of November, an order for a Receiver was made ; but on the 2nd of January last, probate was granted to the Defendant. On the 12th of January, the Defendant moved to discharge the Receiver, and he then asked for his costs of the suit. The Receiver was discharged ; but it was objected, that the application for costs was premature. I took that view of the case ; but, on further reflection, I am of opinion I was wrong, and that I ought then to have disposed of the question of costs. The Defendant now moves to dismiss the bill for want of prosecution, with costs, and, in opposition to the motion, the case of *Edwards v. Edwards* (a) was cited, to shew that the Court would not make such an order. I have communicated with the Vice-Chancellor on the subject, and I find that all that was decided by him, or that he intended to decide, was this :—that where a Receiver is appointed, and the litigation was still pending, the motion to dismiss cannot be maintained, because such a suit is never brought to a hearing

(a) 17 Jur. 826.

a hearing. I have inquired as to the practice at the Registrar's office, and find that such a suit is never brought to a hearing. I am, therefore, of opinion, that I ought to have decided the question of costs on the former motion, and I must now allow this point to be disposed of.

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It was argued, that the Court never gives costs in these suits, because the object is only for a Receiver pending the litigation, and therefore, when that is over, there is an end of the whole proceeding. I think otherwise, and that, if required, this Court is bound to look into the circumstances of the case, in order to ascertain whether there existed a proper case to justify the Plaintiff in filing a bill for a Receiver. This must mainly depend on what has taken place in the Ecclesiastical Court. If that Court has determined that the Plaintiff in equity ought to pay the costs there, the result ought to be the same here. But if the suit in the Ecclesiastical Court is proper, and the Ecclesiastical Court has ordered the costs to be paid out of the estate, the same course would probably be taken here.

If, therefore, the parties will agree on a statement of facts, I will decide upon the costs of the suit ; but if not, I will give leave to amend the notice of motion, with liberty to both parties to file affidavits.

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NOTE.—The Plaintiff appealed to the Lords Justices, but the appeal motion was dismissed with costs.

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*Nov. 21, 22,  
23.*

*Dec. 3, 4, 5, 6.  
1856.  
April 7.*

Classification  
of the three  
cases, in which  
the estate of a  
deceased partner  
is entitled  
to participate  
in the subse-  
quent profits  
of a trade, in  
which his capi-  
tal has been  
employed.

The estate  
of a deceased  
partner is en-  
titled to parti-  
ciple in the  
goodwill of a  
business,  
which does  
not belong to  
the surviving  
partners, ex-  
cept by ex-  
press agree-  
ment.

By partnership articles, on the death of a partner, the survivors were entitled to the goodwill. *A. B.*, a partner, died in 1801, having appointed his co-partners executors. They continued the trade, having made out an account, from which it appeared, that the assets (consisting nearly wholly of outstanding debts) were 496,000*l.*, the liabilities 410,000*l.*, and the surplus 85,900*l.*, of which *A. B.*'s share was 55,000*l.* The survivors carried this to the credit of the deceased partner's account, and they paid the amount with interest to the *cestuis que trust* as they respectively came of age. In 1831 the children claimed to participate in the profits of the subsequent trading, which, in the thirty years, had amounted to 308,000*l.*, on the ground that their capital had been employed therein. At the hearing, inquiries were directed with a view to charge them. But, on the Master's report, the Court having come to the conclusion, that at the testator's death the surplus was merely nominal, that the business, to wind up, was insolvent, and that the subsequent profits were attributable to goodwill and the personal exertions and capital of the surviving partners, Held, that the Plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the goodwill and connexion in trade of the old firm, and that their share in that portion of the profits in which they would be entitled to participate, could not be estimated higher than the interest already paid.

**WEDDERBURN v. WEDDERBURN (a). (No. 4.)**

**I**N 1796, *John Wedderburn, David Webster* (the testator), and *Sir David Wedderburn*, entered into partnership, and executed articles specifying the terms and duration of that partnership, which was to continue for seven years.

The terms of partnership were regulated by a deed, executed on the 21st of *May*, 1796; the parties to it were *John Wedderburn, David Webster* (the testator), and *Sir David Wedderburn*. It recited, that the two former had carried on business as co-partners for several years, and that they had agreed to take *Sir David Wedderburn* into partnership with them, and that the three had agreed to become partners for seven years from

(a) Reported 2 *Keen*, 722; 4 *Myl. & Cr.* 41; 2 *Beav.* 208; 17 *Beav.* 158, and 18 *Beav.* 465.

from the 1st of *May*, 1796, on the terms, that the two former were to take five-sixths of the capital and profits equally between them, and Sir *David Wedderburn* the remaining one-sixth; but that if either of the two former should die during the term of seven years, then that the survivor of them should take two-thirds, and Sir *David Wedderburn* one-third. And the deed recited, that Sir *David Wedderburn* had brought into the concern 10,000*l.*, which was to entitle him to one-sixth of the capital stock. The articles then witnessed the agreement by the three, that they should carry on the business together for seven years, that *John Wedderburn* and *David Webster* should take five-sixths, in equal moieties, and Sir *David Wedderburn* one-sixth of the capital and profits, and then it proceeded thus:—

“ But that if either of them, *John Wedderburn* and *David Webster*, shall happen to die during the term of seven years, leaving the said *David Wedderburn* him surviving, then and in such case, and from and after the 1st day of *May* next ensuing the death of such of them, *John Wedderburn* and *David Webster*, as shall first happen to die, the survivor of them, the said *John Wedderburn* and *David Webster*, shall and will become, and be interested or entitled to two full third parts or shares of the said joint trade or business, and the capital and joint stock thereof, and the gains, profits, increase, benefits and advantages to arise therefrom, and the said *David Wedderburn* shall, from thenceforth, be interested in and entitled to the remaining third part or share of the same joint trade or business, and the capital or joint stock thereof, and the gains, profits, increase, benefits and advantages to arise therefrom.”

The deed then proceeded to provide for the manner  
in

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in which the business was to be carried on, and for the duties of the partners, as between themselves. It specified the mode of taking and keeping the accounts during the partnership, and after the termination of it, and the mode of winding it up, and it then contained a proviso.

"That if any one of the co-partners shall happen to die during this co-partnership, then the executors of such co-partner shall stand in his place, and be considered as a partner with the survivors until the 1st day of *May* next after the death of such deceased partner, at which time, and not sooner, the said co-partnership shall, as to such deceased partner, determine," but the executors should not be permitted to act in the management of the business. It then provided, that the surviving partners should not enter into any new engagements, &c., so as to prejudice the executors, &c., of the deceased partner or his interest in the capital or joint stock of the said co-partnership, the gains, profits or increase thereof. And that upon the 1st day of *May* next after the death of the deceased partner, or within three calendar months then next ensuing, the surviving partners should make out, state and adjust, a full account of "the said joint stock and trade, and all monies, debts, goods, wares, merchandizes, profits, property and effects whatsoever, which shall be then in, due or belonging to the same stock and trade, or to the then surviving partners and the executors of the deceased partner, on account thereof, and also of all debts, &c., owing from the said co-partnership, so as that it might thereby appear what the true state and condition of the said joint stock and trade should then be, and what part of the joint stock should be then actually due or belonging to the surviving partners, and
to

to the executors of the deceased partner." It then provided for the delivery of a copy of such account to the executors of the deceased partner, and that the parties should meet and examine the books, and settle between them the partnership accounts, and sign the account which was then to be binding and conclusive. And that as soon as conveniently might be afterwards, payment should be made of all the just debts, and after payment thereof "*then true payment, division, partition and delivery should be made*" by and between them, according to their shares and interest in the business, of "all the clear residue and surplus of the monies, securities, goods, wares, merchandize, property and effects whatsoever, which should be then due or belonging to the said joint trade or business," or to the surviving partners and the executors of the deceased partner in respect thereof. And also, "that all outstanding debts due to the partnership, after payment of the just debts, should be divided between the said survivors and the executors of the deceased partner in proportion to their shares in the said joint trade." It then provided for the assignment of the debts, and that mutual releases were to be executed. And it was agreed, that if any of the copartners should die during the seven years, the said business should be carried on by the two surviving partners during the residue of that period upon similar terms.

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The parties accordingly carried on the partnership together until *March*, 1801, when *David Webster* died, having made his will, by which he appointed his two surviving partners and his wife executors. She renounced probate, and the surviving partners alone proved and acted as executors. In *May*, 1801, they drew

1855. drew up a balance sheet of the accounts of the partnership, which shewed the following result :—

| WEDDERBURN
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WEDDERBURN. | £ s. d. |
|---|---------------------|
| Assets | 496,766 2 8 |
| Liabilities, exclusive of the sums
to the credit of the partners . | 410,782 7 9 |
| Surplus . . | <u>85,983 14 11</u> |

The sums to the credit of the several partners were as follows :—

| | £ s. d. |
|----------------------------------|----------------------|
| <i>John Wedderburn</i> | 24,407 10 4 |
| Estate of <i>David Webster</i> . | 55,101 2 1 |
| Sir <i>David Wedderburn</i> . . | 6,475 2 6 |
| | <u>£85,983 14 11</u> |

This balance sheet was entered in the journal of the old firm, with a memorandum at the foot signed by the surviving partners authenticating its correctness.

They then ceased to use the name of the old firm and constituted themselves a new firm ; they opened new books for the new firm, and they retained the old books for the purpose of winding up the concerns of the old firm, and carried on the accounts accordingly. In their old books, the account of *David Webster*, as a partner in the old firm, was continued. In this account, the sum of 55,101*l. 2s. 1d.* was entered to his credit, and the share of the profits made in winding up the concerns of the old firm, to which his estate was entitled, and interest at 5*l.* per cent. on the balance of the account for the time being, was also entered to the credit of this account. As the children of *David Webster* respectively attained twenty-one, the executors and surviving

viving partners paid them the sum of money to which they would have been entitled, on the assumption that the accounts entered in the old books correctly shewed what *David Webster's* estate was entitled to receive in respect of his interest in the business, and on the assumption that the 55,101*l. 2s. 1d.*, which appeared in the balance sheet of *May*, 1801, had since that date been actually realized. They also paid to them interest thereon, and the further sum of 6,000*l. 15s. 11d.*, which was the balance which had been credited by them to the testator's estate, in addition to the 55,101*l. 2s. 1d.* and interest as his share of the subsequent profits, which arose after *May*, 1801, upon the realization and winding up of such of the transactions of the old firm as the new firm had not professed to take to and carry over in their own books. This 6,000*l. 15s. 11d.* was not included in and formed no part of the 308,440*l.*, hereafter stated to have been ascertained by the Master to be the amount of the profits made by the new firm and their successors after the 1st of *May*, 1801. Releases were executed by the children as they came of age, and received their shares (a).

In *February*, 1831, the surviving children of *David Webster*, and the representatives of those who were dead, filed this bill, praying a declaration, that the children of *David Webster* were entitled to participate in the profits made by carrying on the partnership business since his death, asking for the accounts consequent on that declaration, together with the usual accounts of the estates of *David Webster* and the administration thereof. The cause came on to be heard in 1836 before Lord *Langdale* (a), who made a decree directing the usual accounts of the estate of the testator, and the account of

(a) 2 *Keen*, 722.

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of the dealings of the partnership firm of *Wedderburn, Webster & Co.*, up to the 1st of *May*, 1801. An inquiry of what, on the 1st of *May*, 1801, was the value of the testator's interest in the concern, and an account of the profits of the trade, as the same were carried on, from time to time, by the successive firms, and also an inquiry what sum of money had been applied for the benefit of the testator's estate, and the amount of capital from time to time employed in the firms respectively, with liberty to state any circumstances specially. This decree was affirmed by Lord *Cottenham* (*a*).

The Master made his report in *February*, 1846, without finding any circumstances specially. Exceptions were taken on account of this omission, and Lord *Langdale*, on the hearing of these exceptions on the 20th *July*, 1846 (*b*), made an order making it imperative on the Master to find, specially, any circumstances which affected the case.

Under that order, the Master made his report dated the 18th of *April*, 1855. The effect of which was as follows:—an account was taken of the assets and liabilities of the old firm, which appeared to have been substantially correctly stated in the balance sheet, and the accuracy of which was not now impeached. By this it appeared as follows:—

	<i>£</i>	<i>s.</i>	<i>d.</i>
The Assets . . . . .	496,766	2	8
The Liabilities . . . . .	410,782	7	9
Surplus . . .	<u>85,983</u>	<u>14</u>	<u>11</u>

Of these assets, 444,367*l.* 16*s.* 10*d.* consisted of *debts due*

(*a*) 4 *Mylne & Cr.* 41.

(*b*) Referred to in 18 *Beav.* 465.

due to the firm, of which only 39,793*l.* 17*s.* 3*d.* were secured by mortgage, being less than one-eleventh part of the total amount of the debts ; and even of the part so secured by mortgage, 24,793*l.* being more than three-fifths, was secured on property inadequate to raise more than 17,000*l.*, so that, in effect, only 32,793*l.* 17*s.* 3*d.* of this large amount of debt was secured by mortgage. Of the total amount of the debts, 243,333*l.* 16*s.* 8*d.* were due from planters and persons connected with the Island of *Jamaica*, and 179,179*l.* 11*s.* 5*d.* from the estate of *James Wedderburn*, which produced 1,000 hogsheads of sugar annually, but it was proved that it would not have produced a loan from any merchant taking the consignments exceeding 50,000*l.*

The Master found, that the sum of 55,101*l.* 2*s.* 1*d.* was the value, on the 1st of *May*, 1801, of the testator's interest in the concern, and he found the profits made by the new firm and their successors, from 1801 to 1836, amounted to 308,440*l.*

It also appeared by the Master's report, not only that the 55,101*l.* 2*s.* 1*d.* had been eventually realized, but that, upon winding up of such of the transactions of the old firm as were not professed to be taken to by the new firm and carried over in their books from the books of the old firm, there was upon the result of such realization or winding up a balance of 6,000*l.* 15*s.* 11*d.* in favour of the testator's estate beyond and in addition to the said 55,101*l.* 2*s.* 1*d.*, which appeared in the balance sheet of 1st *May*, 1801. Such balance had been credited to the testator's estate, in addition to the 55,101*l.* 2*s.* 1*d.*, and the interest thereon.

He found a number of other special circumstances, and amongst them, "that the assets of the old firm, as shewn

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<p><b>1855.</b></p> <p style="text-align: center;"><b>WEDDERBURN</b> v. <b>WEDDERBURN.</b></p>	<p>shewn by the balance sheet, comprised the several particulars following, that is to say :—</p>	
		<b>£ s. d.</b>
	Debts due from sundry persons, and items of credit assumed by the said new firm . . . . .	103,017 11 8
	Debts due from the estate of <i>James Wedderburn</i> , deceased . . . . .	179,179 11 5
	Debts due from sundry other persons. . . . .	162,170 13 9
	Sundry ships, leases of counting-house and goods. . . . .	52,210 5 5
	Government Funds . . . . .	188 0 5
		496,766 2 8

“That all the debts which, on the 1st day of *May*, 1801, were owing to the old firm were entered in the balance sheet as assets, and at the full amount.

“That the greater part of the assets of the old firm was not, on the said 1st day of *May*, 1801, or for several years subsequent thereto, capable of being realized or converted into money, at the amounts stated in the said balance sheet, and that the greater portion could only be realized by extending the recovery thereof over a series of several years.”

He also found, “that the ultimate realization of the debts of the old firm, so far as realized, was effected by the extending the realization of the greater part of the same over many years, and, in some cases, by resorting to legal proceedings, and, in the meantime, the funds realized from the assets of the old firm were insufficient to provide for the liabilities of that firm; and that *John Wedderburn* and *Sir David Wedderburn* were compelled to provide, and through the agency of the new firm did provide, large sums to meet such liabilities. That according

cording to the ordinary course of business and the general experience of *West Indian* merchants, in like cases, the liquidation of claims and liabilities of such magnitude could not have been attempted, in any different manner, without incurring great risk of enormous losses and eventual insolvency." That the sums advanced by the surviving partners in discharging of the liabilities of the old firm always greatly exceeded the assets of the old firm got in.

"That if the affairs of the firm had been brought to a close on the 1st of *May*, 1801, or if doubt had been then raised in the minds of their creditors, as to their ability to continue their payments, the natural effect would have been, that the debts due from them would have been immediately called for, and that they would have been compelled to suspend their payments, which would have caused an immediate or very early realization and distribution of their assets to be enforced, and in that case, so far from there being any surplus coming to the partners, such assets would have proved insufficient to pay their creditors in full.

"That it was impossible, in the year 1801 and for several years afterwards, to have called in and compelled payment of such an amount of debts due to the old firm as was necessary to provide for their liabilities; and that having regard to the nature of such debts, and particularly the debts due to the old firm by the estate of *James Wedderburn*, and for reasons thereafter stated, it was not possible to raise money to an adequate amount by a transfer of such debts to any third party.

"That the position of the old firm on the 1st of *May*, 1801, was one of great uncertainty and risk, and the ultimate solvency of such firm depended, as a necessary condition,

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condition, on the skill and judgment exercised in getting in their debts, and managing and winding up their affairs, and providing large funds to meet their liabilities in the meantime.

"That no merchant or house of business of adequate means or respectability would, under the circumstances of the case, have assumed the business of the old firm, on the terms of receiving their assets and discharging the whole of their liabilities, excluding from such liabilities the sums coming to the partners as shewn by the said balance sheet."

The Master found, that the firm were in a state of much difficulty and pressure, "from want of adequate means to meet their engagements," and had recourse to various means out of the ordinary course of business for raising money. The report then set out those expedients, which consisted of irregular bill transactions, loans, &c., which evidently shewed the straits to which, after the testator's death, they were reduced for ready money.

Exceptions were taken to the Master's report both by the Plaintiff and by the Defendants, and the cause now came on upon these exceptions, and for further directions.

Mr. *Rouppell* and Mr. *Cole*, for the Plaintiffs. The original decree has conclusively determined the Plaintiffs' right to a participation, to some extent, in the profits made by the new partnership. The account of such profits given by the decree could only have been given on the footing that the Plaintiffs were entitled so to participate; and the sole question therefore which remains for the Court to determine is, the extent to which

which this right of participation ought to be carried. The sums which have been credited to the testator's estate for interest on the 55,10*l.* 2*s.* 1*d.* form no part of the 308,440*l.* which the Master has ascertained as such profits; for interest was always deducted with the other outgoings of the trade before any profits were credited to the concern.

It has been correctly ascertained, that the testator's share of the capital on the 1st *May*, 1801, was 55,10*l.*, at which sum the surviving partners entered it in the balance sheet, and which has been actually realized and more than realized by the subsequent winding up, and the sums which the surviving partners allege to have been advances of capital made by them to carry on the concern, after the testator's death, consisted in fact not of their own capital, but of monies which arose from new debts incurred by them in carrying on the trade, in which the testator's capital was still embarked, and which derived great part of its credit from such capital. Debts owing by traders to their customers did not form part of the capital of the members of the firm, but the capital of each partner consisted merely of the sums which, from time to time, were due to him individually from the concern, and the total capital must be made up of the aggregate of the capitals of the partners individually. As the alleged advances always greatly exceeded the aggregate capital of the surviving partners, they were therefore not advances by them, but advances by the concern, in which the testator's estate was a *quasi* partner. The Plaintiffs are therefore entitled, on the footing of the decree, to such a proportion of the 308,440*l.* profits, as the testator's capital bore to the capital employed by the new firm, that is, to fifty-five eighty-sixth's of 308,440*l.*, with annual rests; and such capital of the new firm is to be calculated exclusive of the amount

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amount of any new debts incurred by such new firm and incorrectly called "advances" by the new firm for the old firm. As the debts owing to the old firm gave the control over the *West India* estates, and secured the consignments, the profits made by the business which resulted therefrom ought to be treated as the joint property of the partners in the old and new firm. They asked for a decree similar to that in *Docker v. Somes* (*a*), and cited *Cook v. Collingridge* (*b*); *Crawshay v. Collins* (*c*); *Stocken v. Dawson* (*d*); *Burden v. Burden* (*e*); *Pennell v. Deffell* (*f*).

Mr. R. Palmer and **Mr. Cotton**, for the Defendants.

The decree only finally settled one point, viz., that the releases could not stand; all the rest was left subject to the inquiries. This is shewn by the judgments of Lord *Langdale* and Lord *Cottenham*, and by the subsequent observation of Lord *Langdale* in 1846.

The value of the testator's share in 1851 was not 55,101*l. 2s. 1d.*, or anything like it. This sum was the amount entered in the balance sheet as the balance upon the figures. It was not a valuation of the assets, and was not treated as such. If the surviving partners had received the balance in money, and had employed it in their business, they would then have been liable to account for the profits; but that was not the case. The debts could not be got in, and the new firm were always in advance. Before the facts were ascertained, the case was treated as one in which the surviving partners had purchased or taken the assets; that was not so; they only purchased the ships, but they got in the debts as they were able, and then divided them. The share

of

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| (<i>a</i>) 2 <i>M. & K.</i> 655. | (<i>d</i>) 6 <i>Beav.</i> 371. |
| (<i>b</i>) <i>Jacob</i> , 607. | (<i>e</i>) 1 <i>Vesey & B.</i> 170. |
| (<i>c</i>) 15 <i>Ves.</i> 218; 2 <i>Russ.</i> 325. | (<i>f</i>) 4 <i>De G., M. & G.</i> 372. |

of the testator was, if realized at the time of his death, *nothing*, and the new firm in no way traded with the capital of the old. As executors, they can only be charged with what they did receive, or with what they might and ought to have received. They have fully accounted for the former, and as to the latter, it is now proved to demonstration that it was impossible for them to have received more than they have accounted for.

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By the particular terms of the partnership deed, the assets were not to be sold, but divided, and the goodwill was to belong to the survivors. The subsequent profits are attributable to the goodwill, and to the exertion, skill and capital of the partners in the new firm, and, it is clear, now that the real facts of the case are ascertained, that the Plaintiffs have no right to participate in the subsequent profits, on the ground of the retaining and risking of their money in the trade.

They cited *Crawshay v. Collins* (*a*) ; *Rowley v. Adams* (*b*) ; *Cook v. Collingridge* (*c*) ; *Brown v. De Tastet* (*d*) ; *Willett v. Blanford* (*e*) ; *Simpson v. Chapman* (*f*) ; *Featherstonhaugh v. Fenwick* (*g*) ; *Heathcote v. Hulme* (*h*) ; *Smith's Wealth of Nations* (*i*) ; *Jones v. Foxall* (*k*) ; *Portlock v. Gardner* (*l*) ; *Twyford v. Trail* (*m*) ; *Styles v. Guy* (*n*) ; *The Queen v. The Lancaster and Preston Junction Railway Company* (*o*).

Mr. Roupell, in reply. The surviving partners were not,

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| (<i>a</i>) 15 <i>Ves.</i> 218; 1 <i>J. & W.</i> 267; 2 <i>Russ.</i> 325 | (<i>g</i>) 17 <i>Ves.</i> 298. |
| (<i>b</i>) 7 <i>Beav.</i> 395; 2 <i>H. L. Ca.</i> 769. | (<i>h</i>) 1 <i>Jac. & W.</i> 122. |
| (<i>c</i>) <i>Jac.</i> 607. | (<i>i</i>) Pages 5 and 35 (11th ed.). |
| (<i>d</i>) <i>Jac.</i> 284; 4 <i>Russ.</i> 126. | (<i>j</i>) 15 <i>Beav.</i> 338, 394. |
| (<i>e</i>) 1 <i>Hare</i> , 253. | (<i>l</i>) 1 <i>Hare</i> , 606. |
| (<i>f</i>) 4 <i>De G., M. & G.</i> 154. | (<i>m</i>) 7 <i>Sim.</i> 92. |
| | (<i>n</i>) 1 <i>Mac. & Gor.</i> 422. |
| | (<i>o</i>) 6 <i>Q. B. Rep.</i> 759. |

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not, under the partnership articles, entitled to the goodwill properly so called. The articles did not provide, that the surviving partners should be entitled to take the partnership premises *in specie*, or prevent the representatives or legatees of the deceased partner from carrying on business with such of the assets as, upon partition under the articles, should be found to belong to them as the testator's share of the surplus assets. The articles merely intended to provide, that, upon the death of one partner, there should be a continuing partnership between the survivors, who were intended to carry on their business, with such only of the assets as would then belong to them. This, however, was quite different from a contract that they should be entitled to the goodwill. But even if the goodwill did, under the articles, belong to the surviving partners, it was of no value if the testator's capital in the concern, without which it could not have been carried on for a single day, was to be considered of no value. The same argument that is used to depreciate the value of the testator's capital, must have the effect of depreciating, to an equal extent, the value of the goodwill and of the capital employed by the surviving partners. The question must therefore be, to what extent have profits been made by the use of the testator's capital? Without that capital no profits at all could have been made; but, with it, profits have been made to an extent exceeding 30*l.* per cent. on the capital employed. Why then should the surviving partners and executors retain to themselves the fruits thus made by the profitable employment of the testator's property? Even if it were true, that at the testator's death, the state of the partnership affairs was such, that it was impossible to follow the directions of the partnership articles as to partition, &c., and it was necessary that the trade should go on, as before, with all the capital embarked in it, including the testator's,

tator's, nevertheless the profits subsequently made by the trade were just as much attributable to the testator's capital as if the use of such capital had been voluntary instead of involuntary. The motives which induced the use of the testator's capital can make no difference in the result, if in fact it were used, and profits made thereby.

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The Master of the Rolls reserved judgment.

The Master of the Rolls, after giving an outline of the facts of the case, proceeded as follows:—

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I think it unnecessary here further to detail the facts of the case, which are reported generally in Mr. *Keen's Reports* (a); so far as they bear out the view I have taken, I shall refer to them as I proceed. I omit also all consideration of those matters which were decided at the hearing, but have now no bearing on the case, such as the releases, which were set aside. The difficulty of the case, in truth, though considerable, does not proceed from any complication of facts, or any doubt as to their accuracy, but from a doubt as to the just inferences to be drawn from them, and as to the extent to which, and the manner in which, the principles of equity governing such matters are applicable to them.

There are three classes of cases frequently occurring, where the liability exists of accounting for the profits made in the carrying on of a trade, by the use of capital belonging to the estate of a deceased person. The first class I refer to, is that of surviving partners, who, after the partnership has been dissolved by the death of one partner,

Classification of the three cases, in which the estate of a deceased partner is entitled to participate in the subsequent profits of a trade, in which his capital has been employed.

(a) 2 *Keen*, 722, and 4 *Myl. & Cr.* 41.



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partner, continue the trade with the capital, composed wholly or in part of the estate of the deceased partner. The rule applicable to such a case is the same, whatever be the cause of dissolution of the partnership, and the liability to account does not proceed on the ground of any misconduct in the continuing partners, but solely on the ground, which is common to all the cases, that the profits are matters arising from the capital, and, consequently, that they belong to the persons to whom the capital belongs. In these cases, the amount of capital belonging to the deceased person so employed in trade is often a matter difficult to be ascertained.

The second class of cases is not a case of partnership, but where the legal personal representatives of a deceased person employ the assets in carrying on a trade for their own benefit; the liability to account for profits, in this case, proceeds principally on the ground of misconduct and breach of trust in the executors. In these cases, the amount of capital so employed is generally easily ascertained, and the *cestuis que trust* are entitled, at their option, to interest at five per cent. on that amount, or to the profits actually made.

The third class of cases partakes of both the former, and involves, to some extent, the character of both. It is the mixed case, where the surviving partners are also the legal personal representatives of the deceased partner. The liability to account, in this case, does not necessarily proceed on the ground of misconduct, but involves a consideration of the circumstances of each particular case. In the first and third classes of cases, the matter may be wholly or in part regulated by the contract, *i. e.* by the partnership articles. In the second class of cases, no contract exists affecting the testator or his property. Another distinction consists in the fact, that the

the amount of property employed in trade is ascertained in the second class of cases, but is wholly unascertained in the first and third, and the mode of ascertaining it forms a very material ingredient in the consideration of the questions which arise. In the first and third classes, where no contract affects the question, the amount of the deceased partner's interest ought to be ascertained by an actual sale of the whole business, including the goodwill; and if not so ascertained, this Court endeavours, so far as it can, to supply the defect, by directing a sale when the business is finally wound up. The case before me is one of the third class. It is to be governed principally by the rules which apply generally to the case of surviving partners carrying on the trade of a deceased partner; and these rules, to use the expression of Lord *Eldon* in *Crawshay v. Collins* (a), may and they ought to be regulated by contract, and they may be varied by the peculiar circumstances of each case; and so far is this carried, that Lord *Eldon* observes in page 344 of the same volume, "that the rule which is to be applied must be deduced, in almost every case, from the peculiar circumstances of that very case."

With these preliminary observations, I proceed to consider the facts of the case before me. On the exceptions, I have to consider whether the Master has accurately represented the facts found by him according to the evidence; and on the further directions, I have to consider, what are the conclusions of law which are properly deducible from these facts. The case on the exceptions is virtually the same as on the further directions, because there is no conflict of testimony, and the exceptions are rather directed to the inferences drawn by the Master, than to the facts on which they are founded.

(a) 2 *Russ.* 325.

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1856. founded. I shall, therefore, adopt the same course, which, as I have already observed, was properly pursued in argument, and rather look at the case as a whole, than endeavour, by a determination of the exceptions, *seriatim*, to separate it into individual parts. In this mode of viewing the case, the first matter to be inquired into is the state and condition of the parties at the death of the testator, and particularly of the surviving partners. The first thing to be considered, in ascertaining the situation of the surviving partners on the death of *David Webster*, is, how far the rights and interests of the parties were regulated by the partnership articles, and next, how far these have been followed or departed from.

The terms of the partnership were regulated by a deed executed on the 21st of *May*, 1796. [*His Honor here stated the substance of it, as ante, pages 84—86.*]

On the death of *David Webster* in *March*, 1801, his wife renounced probate, and the two partners having alone proved the will, they thereby rendered it impossible for them to act upon so much of the provision of the partnership articles, as directed the surviving partners to come to an account with the executors of the deceased partner, as to the amount of his share in the partnership. The attempt to do so was, accordingly, decided by the decree of the Court to be inoperative, and the account is to be taken, on the footing of no binding ascertainment or settlement of the testator's share having been made. The decree pronounced by Lord *Langdale* has directed the value of that interest now to be ascertained, with the view, as it would seem from his judgment, of compelling the surviving and succeeding partners to account for so much of the profits subsequently earned by the partnership, as had been

been earned by or was properly attributable to the share which *David Webster* had in the assets of the concern. For the purpose of ascertaining of what that share consisted, and the value of it, it is necessary to look both at their rights under the articles, and the state of the business of the concern. The passages I have read from the articles shew one very important variation, which exists in this case, from those on which this Court has usually had to adjudicate, which is, that the estate of the deceased partner was not to be entitled to any portion of what is usually called the *goodwill*, but that the whole of this survived to remaining partners, who were at liberty to carry on the concern as they pleased. They were not compellable to wind up; all that they had to do was, to ascertain the value of *David Webster's* share, and to pay that amount to the executors.

This, therefore, is not a case where the partnership having been dissolved by death, the executors of the deceased partner would have been entitled to have had the value of his testator's share ascertained by sale. That rule, which applies to cases where there are no articles, or when they are silent on this point, is excluded by the provisions of the contract establishing this partnership. The circumstance that *David Webster* appointed his partners executors, although it precluded them from ascertaining the share of *David Webster*, as specified in the articles, could not increase the value of *David Webster's* estate, and therefore, in ascertaining the amount of it and also in ascertaining how much of the subsequent profits are derived from and are properly attributable to employment of his capital, I think that it ought, if possible, to be ascertained, how much of the value of the partnership consisted in goodwill, and how much of the profits are attributable to it.

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The estate of a deceased partner is entitled to participate in the goodwill of a business, which does not belong to the surviving partners, except by express agreement.

The *goodwill* of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity. Accordingly, in reported cases, Lord *Eldon* held, that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. *Goodwill* manifestly forms a portion of the subject matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern. There is considerable difficulty in defining, accurately, what is included under this term *goodwill*; it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable, which may be preserved (at least to some extent), if the business be sold as a going concern, but which is wholly lost, if the concern is wound up, its liabilities discharged, and its assets got in and distributed. I am of opinion, then, that, both on principle, on the authority of the decided cases, and on the ordinary rules of common sense, I must, whenever there is a reputation and connection in business, constituting *goodwill*, treat that as part of the assets of the concern. Whatever part that was, of the concern of *Wedderburn, Webster & Co.*, that part of it, by the partnership articles, belonged to the survivors of the partners after the 1st of *May* which followed next after the death of one of the partners. The estate of the deceased partner was to continue a partner up to the next 1st of *May*, and then the partnership was to cease.

cease. Therefore, after the 1st of *May*, 1801, the estate of *David Webster*, though his capital was contained in the concern, was entitled to no portion of the profits properly attributable to, and derived from, that portion of the partnership property which can be called *goodwill*, provided this portion could be separated and ascertained. With a view to ascertain this, the state of the concern, at the death of the testator, must be carefully considered, bearing in mind Lord *Eldon's* remarks in *Crawshay v. Collins* (*a*), that the rule which is to regulate the winding up of a partnership or a dissolution must be deduced, in almost every case, from the particular circumstances of that case; an observation which is confirmed by the Vice-Chancellor *Wigram*, in his careful and elaborate judgment in *Willett v. Blanford* (*b*), who illustrates this view of the case by suggesting no less than six different cases, in which the rule to be applied must be varied materially. By the word "rule" I understand to be meant the general rule, that the surviving partners shall account for so much of the profits as is applicable to the share which the deceased partner had, at his death, in the funds of the partnership.

The facts, exhibiting the state and condition of the partnership at the death of the testator, are now first presented to the Court in a distinct and authentic form, on which the Court can adjudicate. It was in order to obtain the authentic establishment of these facts, that Lord *Langdale* pronounced the original decree, and that Lord *Cottenham* affirmed it. This appears from various passages in Lord *Cottenham's* reported judgment, and it also appears that Lord *Langdale* entertained the same view, from the fact, that he sent this case back to the Master, in 1846, with a special direction that he should

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(*a*) 2 *Russ.* 344.

1 *Hare*, 253.

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find and state in his report all matters bearing on this question, although, under the direction, giving the Master liberty to state any circumstances specially, he may, according to the ordinary practice (a), at his discretion and without appeal, avail himself of this permission or not, as he may think fit.

The facts now found by the Master and established by the evidence are very peculiar, and the following may, I think, be stated to be a correct summary of them :—

An account was taken of the assets and liabilities of the old firm, which appears to have been substantially correct, and the accuracy of which is not now impeached. By this it appears that the assets amounted to 496,766*l.* 2*s.* 8*d.*, and the liabilities to 410,782*l.* 7*s.* 9*d.* leaving a surplus of 85,983*l.* 14*s.* 11*d.* Of these assets, 444,367*l.* 16*s.* 10*d.* consisted of debts due to the firm, of which only 39,793*l.* 17*s.* 3*d.* were secured by mortgage, being less than one-eleventh part of the total amount of debt; and even of the part so secured by mortgage, 24,793*l.*, being more than three-fifths, was secured on property inadequate to raise more than 17,000*l.*, so that, in effect, only 32,793*l.* 17*s.* 3*d.* of this large amount of debt was secured by mortgage. Of the total amount of the debts, 243,333*l.* 16*s.* 8*d.* were due from planters and persons connected with the Island of *Jamaica*, and 179,179*l.* 11*s.* 5*d.* from the estate of *James Wedderburn*. This estate produced 1,000 hogsheads of sugar annually, which would not have produced a loan from any merchant taking the consignments, exceeding 50,000*l.* The evidence shews, that the laws prevailing in *Jamaica* made it extremely difficult speedily to realize a debt due from any planter, and Mr. *Lewis*,

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(a) See *Knott v. Cotttee*, 16 *Beav.* 82.

twelve years the Advocate-General of the Island, states, that it was the policy of the laws of *Jamaica* to give the debtor as much time as possible. The liabilities of the concern were all immediately payable, and any doubt or discredit thrown on the firm would have produced an immediate attempt to enforce payment of them all. In this state of things, it is obvious what would have been the consequence of an attempt to realize the assets of the concern and to wind it up. The evidence of all the witnesses concurs in this:—that such an attempt would have produced a complete and disastrous insolvency. Having carefully read and considered the evidence, I am of opinion that the Master has come to a correct conclusion, when he finds “that the ultimate,” &c. [*see the passage stated ante, page 92*]; and again he states, “That if the affairs of the old firm,” &c. [*See the passage stated ante, page 93.*]

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I have already observed, that, in this case, the right to have the testator's share ascertained by sale of the assets and winding up of the concern was excluded by the partnership contract; but if it had existed and had been enforced, it is plain to demonstration, that the Plaintiffs, instead of receiving, as they ultimately did, 55,101*l.* and interest, would have been left, so far as *David Webster's* partnership estate was concerned, perfectly destitute, and without one shilling. It would not, therefore, be correct to say, in this case, as it undoubtedly is in most cases where this question arises, that the surviving partners kept the property of the testator in the trade and exposed it to all the risk of trade; for here, not only it incurred no risk from the course actually adopted, but the risk to be apprehended was, from the sudden or rapid attempt to effect the realization of it. It was observed by Lord *Cottenham*,  
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in his judgment (*a*), that it was contended before him, that there was no employment of the testator's capital, inasmuch as the capital of the trade consisted only of debts due, and his Lordship observes, "why were they not called in, but for the interest of the survivors, and what enabled them to give credit, but the capital of the testator?" In an ordinary case, this remark would be perfectly just, but now that the facts are all fully established, by the evidence found by the Master's report, it is clear, that the debts were not called in, as much for the interest of the Plaintiffs as of the surviving partners, and that any attempt to do so, speedily, would have been attended with great loss and ultimate insolvency of the concern.

In this state of things, the first question arises, how ought the first inquiry in the decree to be answered, viz., what was the value of the testator's interest in the concern on the 1st of *May*, 1801? It was valued by the survivors in the books at 55,101*l.* 2*s.* 1*d.*; it has ultimately realized that amount, with interest, not that the survivors, in fact, made any actual valuation of it, but they merely balanced the books, and made out a balance sheet, on the assumption that all the sums there appearing were really good and available. This is shewn by many circumstances, amongst others by the item of 500*l.* for bad debts, which on such an amount as 440,000*l.*, was clearly only imaginary, and not what they really expected that the deficiency, on collecting the debts, would amount to.

In my opinion, this proceeding of the surviving partners amounts to this:—They took this as the value at which they were willing to take the shares of the testator,

(*a*) 4 *Myl. & Cr.* 47.

testator, supposing themselves to have the whole power in their hands to call in the debts when and how they thought fit, and to deal with the debtors as they pleased. Had such an arrangement been made with the executors of the testator, not being his partners, it would have been a good and valid arrangement, on the assumption that full disclosures had been made; as it was, it bound no one, and the Plaintiffs are entitled to say, either that they will take the value at the amount put on it by the executors, or that they will repudiate that value and ascertain what the real value of it was. If they insist on the real value, I know no mode of ascertaining that, except by referring to the rule suggested by Lord *Eldon*, viz., what it would have produced if the whole concern had been then wound up, and the assets realized and sold. In this latter mode of looking at it, I am clearly of opinion, that the share of the testator was worth nothing; nay, that it was worth less than nothing, and that no merchant in the city of *London* could have been induced to accept that share, coupled with the corresponding share of the liabilities.

If this were a mere question of ascertaining the value of the share, which was to be accounted for as a gross sum, without any reference to the profits subsequently realized, I should hold, that the Plaintiffs might, at their option, claim either what it would have produced, if then realized, or the amount at which the surviving executors were willing to take it; but in the latter case, coupled with the conditions impliedly annexed to it, of permitting them to deal with the debtors to the concern in such manner as they thought fit. But the case assumes a perfectly distinct and separate aspect, when the value is to be ascertained for the purpose of calculating how much of the profits subsequently realized is to be attributed to the share of the testator, to which,

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by the decree, the Plaintiffs are entitled. No doubt this would be very easily settled, if the total capital, that is, the whole of the subject-matter producing profits, is to be taken at 85,983*l.* 14*s.* 11*d.*, the nominal balance in the books; and that all subsequent profits are to be attributed to this, and to this alone. It would necessarily follow, that fifty-five eighty-sixth parts of the profits are to be attributed exclusively to the testator's estate; and accordingly this is what the Plaintiffs contend for, and this might be the proper mode of ascertaining the amount of what they are entitled to, if, at the death of the testator, the right existed, in the persons interested in his estate, of having his share ascertained at that time by a sale and the winding up of the concern.

But as this right did not, in my opinion, exist, I must ascertain how much of the profits, subsequently realized by the concern, were properly attributable to the actual capital embarked in it; how much to the connection in trade and the reputation earned by the house; by, in fact, all that which constituted what is usually called the *goodwill*, from all interest in which the estate of the testator was, by the articles, excluded. The actual capital of the concern, apart from the debts due to it, was valued by the surviving partners, and was taken by the new firm at the sum of 52,398*l.* 5*s.* 10*d.*, and this valuation is not now disputed, the proportion of this belonging to the testator was the same as of the rest, viz., fifty-five eighty-sixths. In addition, there were the debts due to the firm, which, in many cases, undoubtedly produced consignments, which produced profits. The question arises, whether these debts are to be treated as actual capital embarked in the concern? I am of opinion, looking at the evidence to which I am about to refer, that the profits subsequently realized from

from this source were properly attributable to the credit and connexion of the house in trade. The surviving partners were obviously persons of great skill and ability in the management of the business, they had a large connexion, and apparently a high reputation; by means of this and of expedients to which they were obliged to resort, and which shew the distress of the firm, they were enabled, clearly with difficulties of no common order, to preserve their credit, and to get over the embarrassment, which pressed heavily upon them at the time of the testator's death, and for several subsequent years. By these means they realized great profits, which enabled them to pay all their liabilities and realize all their assets. In my opinion, the profits were realized from this source, and not from the available surplus of the assets. I think that the sums and the statements in the balance sheet are not actual values then capable of being realized, but what the executors stated as the result of the books, and which, with time and care, might be obtained. In the view I am now taking of this matter, the actual balance being in favour of the firm is not material. Suppose that, on taking the accounts as they stood in the books, there had been an actual deficiency, could that have varied the case? would the fact that, by a proper estimate of the character of the debts and a proper allowance for bad ones, the balance of liabilities had exceeded the amount of assets or the opposite by 1,000*l.*, one way or the other, have varied the case? I think not.

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Assume this state of things to exist:—That, on the death of one partner, in a firm possessing extensive connections and high reputation, it was found that they had no capital of any description, except the counting-house, and that they had liabilities to a considerable amount; and assume that the surviving partners were, notwithstanding

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standing this, able to continue business, to retrieve their affairs and realize large profits for many years. Is it not obvious, that their profits would be wholly attributable to goodwill, that is, to the connection and reputation enjoyed by the firm? In the case supposed, the estate of the deceased partner, in the absence of any stipulation to the contrary, would be entitled to a share of the profits, because he was entitled to a share of the goodwill, which does not survive to the continuing partners. But then assume that, by the partnership articles, it was stipulated that his interest in the goodwill should cease on his death, could his estate, in that event, be held entitled to participate in profits which were not produced by his capital, for he had none, or by his interest in the concern, for none remained to him?

I admit that it is extremely difficult to deal with these cases by any general rule, or to lay down a principle which shall be applicable to all, or indeed a large class of cases, and that it is essential to regard each on its own merits. Undoubtedly there may be a large amount of capital belonging to a deceased partner not consisting of money or available assets, such as machinery, or the case suggested by Vice-Chancellor *Wigram*, of a patent producing profits, which, although the firm were insolvent at the decease of the partner, might, by reason of the profits properly attributable to this, which was his property, have produced a large amount of profits, to which his estate would be clearly entitled. But none of these would be produced from debts due to the firm. These, if capable of being easily realized, would, no doubt, be the same as money; but if, as is proved to have been the case here, they were incapable of being easily realized, they cannot be so treated; nor can I, in the absence of evidence, assume that the *West India* planters sent their consignments to the firm solely because

cause they were debtors, and that they would, if no longer in debt to the firm, have transferred their consignments to another house.

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Looking then at the peculiar circumstances of this case, and observing what it is that the executors have done, I proceed to consider, what it was their duty to do, and what are or would be the consequences of applying, to this case, the view contended for by the Plaintiff: viz., that this nominal surplus constituted the whole of the capital of the firm, and that they are entitled, in consequence, to fifty-five eighty-sixths of the profits subsequently realized.

In the first place, it seems plain, that the testator could have done nothing, other than what he did, to preclude this question arising, unless he had given his surviving partners a power to take his interest in the concern at any price they pleased to fix, which would have simply enabled them to take the whole. He must have known the extreme risk and embarrassment in which the concern was involved. If he had appointed strangers executors, the necessity of communicating the affairs of the partnership to them would probably have revealed their embarrassments, and, if so, would have produced insolvency. He accordingly made his surviving partners executors of his will, probably to avoid this calamity. Having so done, what was it their duty to do? They might, no doubt, have disclaimed the trust and renounced probate of the will; the effect of which, as I have already said, would have been, to disclose the position of the firm, and to have produced an absolute destruction of the interests of the Plaintiffs, as well as of their own. It is true, that they could not buy the shares of the testator at any price, and that such a transaction is wholly void, so far as any benefit to them

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is concerned. It was their duty to wind up the affairs of the old firm as speedily as circumstances would admit. But what does that mean? Is one month or one year the limit to be fixed for this purpose, or is the time really necessary the period to be assigned? The position in which the firm was placed did not admit of this being done speedily, unless with ruin to all parties concerned; but does it therefore follow, that the executors were bound to bring the matter into Chancery, and that, unless they have so done, they must account for fifty-five eighty-sixths of the profits made by them for a long series of years? If they had brought the matter into Chancery, it is obvious that insolvency would immediately have followed, and that the Plaintiffs would have obtained nothing.

Again, assuming that the necessary or some reasonable time ought to be allowed for this purpose, is the mode, in which it must be done, prescribed, and are the surviving partners, who, by the articles, are at liberty to set up for themselves in business, or to carry on the business for their own benefit, precluded from doing so, unless by surrendering all the profits they make? It is obvious, that if the position of the firm could have been communicated to the Court of Chancery at that time, without divulging their affairs to the public, the Court would have said, that the course they proposed to adopt was that most beneficial to the infants, whose interests they were bound to protect. In fact, if, after the experience of what has taken place, and with the full disclosure of the state of the concern now before me, I were now required to determine, in what way the old firm could have been most advantageously wound up, I should not hesitate in coming to the conclusion, that the mode adopted was the only mode by which it could have been accomplished without producing insolvency.

solvency. Except by time and care, by forbearance and attention, the assets of the old firm could not have been realized without ruinous loss, and, above all things, could not have been realized, except by merchants carrying on the same business ; and it is proved, that no other firm of merchants would have adopted the business of this house, together with its liabilities. They did, in fact, in my opinion, adopt the only course which could have been adopted to prevent the utter annihilation of the interest of the infants under the will of the testator.

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Then this question arises :—is it, under such circumstances, an imperative rule of this Court, that one of two things must happen ; either that ruin shall be brought upon the *cestuis que trust*, by resorting to the Court of Chancery and proclaiming the embarrassments of the concern ; or that, if the surviving partners adopt the mode which is proved to be the only one by which the affairs of the firm could be advantageously wound up, they must devote all their labour and skill for the exclusive advantage of the *cestuis que trust* ; and that, in addition to this, they must devote the goodwill, their connection in trade and their reputation, which, in the circumstances, was their exclusive property, for this purpose ? I cannot think, that any such proposition is fairly deducible from the authorities.

I fully concur in all the authorities on which the decisions of Lord *Langdale* and of Lord *Cottenham* are founded, and I adopt all the principles enunciated by them, but I repeat with Lord *Eldon* (a), that the rule to be applied must be deduced, in almost every case, from the particular circumstances of that case ; and I have arrived

(a) 2 Russ. 325.

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arrived at the conclusion, in this case, that by not realizing or rather by not attempting to realize the amount of the testator's share at his decease, they ought not to be charged with the amount of profits which they would have been properly chargeable with, if the 55,000*l.*, at which they valued his interest, had been money in their hands or capable of easy realization, which they had made use of for the purpose of their own undivided advantage, and which they had exposed to all the risks of trade.

I think it unnecessary to examine the authorities at any length on this subject; it is sufficient to say, that in my opinion, they do not compel the Court to come to the conclusion which is insisted upon by the Plaintiffs.

*Crawshay v. Collins* (*a*), in all the reports of it, in its various stages, certainly leads to no such result. It was a case in which the right existed in the assignees of the partner, when bankruptcy had dissolved the partnership, to have his share ascertained by sale, and in that case the *goodwill* did not survive to the continuing partners. Many of the observations of Lord *Eldon*, dispersed through that case, to some of which I have already referred, are most pertinent to the view I take of this case, and he expressly states, that he was surprised when he found what he was supposed to have there decided.

*Cook v. Collingridge* (*b*) was also a case of a similar description, where the articles had provided for a division of the stock in trade between the partners, and where

(*a*) 15 *Ves.* 218; 1 *Jac. & W.* 267, and 2 *Russ.* 325.      (*b*) *Jacob*, 325.

where a collusive sale had taken place to one of the executors.

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Brown v. De Tastet (*a*), and *Featherstonhaugh v. Fenwick* (*b*), were cases of a similar description to *Crawshay v. Collins*; and in *Brown v. De Tastet* Lord *Eldon* gave an allowance for his services to the continuing partner, which he refused in *Burden v. Burden* (*c*), which was the case where the continuing partner was executor.

In *Willett v. Blanford* (*d*), to which I have already referred, Sir *J. Wigram*, in an elaborate and valuable judgment, discusses the whole subject in a masterly manner, which, in my opinion, has justly received the sanction and approbation from the Lord Justice *Turner*, in the case of *Simpson v. Chapman* (*e*); which last case also is confirmatory of the principles laid down in the previous ones, and affords a valuable guide for the application of the rule of liability to account for profits subsequently earned. The judgment in that case establishes, that the liability to account for the profits derived from the trade carried on after the death of the testator, must depend, in the absence of contract, upon the nature of the trade, the mode of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner, and the conduct of the parties after his death, and that all these may materially affect the rights of the parties. Above all, it is to be borne in mind, that all these things may be regulated by contract between the partners themselves.

Unless,

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| (<i>a</i>) <i>Jacob</i> , 284, and 4 <i>Russ.</i> 126. | (<i>d</i>) 1 <i>Hare</i> , 253. |
| (<i>b</i>) 17 <i>Ves.</i> 298. | (<i>e</i>) 4 <i>De G., M. & G.</i> 171. |
| (<i>c</i>) 1 <i>V. & B.</i> 170. | |

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Unless, therefore, I am bound by the terms of the decree, I am of opinion, that applying these tests to the facts of this case, the liability to account for the profits subsequently earned to the extent claimed by the Plaintiffs does not attach.

The next question is, am I compelled, by the decree which has been made in this case, to give to the Plaintiffs fifty-five eighty-sixths of the profits which have been realized, together with the annual growth thereon, by means of yearly rests, in respect of such shares not being withdrawn? I am of opinion, that I am not. The decree directs the accounts to be taken of the estate of testator, and of the partnership, up to 1st *May*, 1801, which was a matter of course in any view of the case. It then proceeds to direct an inquiry of what, on the 1st of *May*, 1801, was the value of the testator's interest in the concern. This also, I think, decides nothing with respect to this point, because, in any view of the case, the Plaintiffs were entitled to have this inquired into, for no valuation or taking, at any price, by the surviving partners, could bind the Plaintiffs. The next is the only direction in the decree which points to this subject. It directs the account to be taken of the profits of the trade, as the same have since been carried on by the successive firms, together with an inquiry of what had been applied for the benefit of the testator's estate, and the amount of capital, from time to time, employed in the firms respectively. The decree contains no declaration that the Plaintiffs are entitled to participate in these profits, in any proportion or to any extent. It seems to have left the whole matter for future adjudication, and the observations of Lord *Cottenham*, in his reported judgment (*a*), seem to point only to his view

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(a) 4 *Myl. & Cr.* 54.

of the necessity of ascertaining the facts, before any future adjudication of the rights of the parties could be made.

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That this was Lord *Langdale's* view, when, on the exceptions to the Master's report, he had occasion to consider the effect of the decree made at the hearing, is shewn by the judgment he then pronounced. He treated the special circumstances connected with the carrying on of the trade, and the position of the firm, as a part of the defence of the Defendants; that is, their defence against the claim of the Plaintiffs to participate in the profits made by the successive firms. He repeatedly refers to his desire to have all the facts before him, in order to be able to decide the questions before him. He undoubtedly states, that the inquiry in the decree is directed upon the foundation of a right in the Plaintiffs to participate in the profits; but he seems to suggest, that this was on the assumption, that the capital of the testator was employed for the purpose of carrying on this trade, and that it was the substantial source of the profits earned; and accordingly, he arrives at a conclusion, which is, at least, unusual in this Court:—that of allowing exceptions to a Master's report, because he had not exercised his discretion, in stating specially the circumstances which affected the position of the firm and the continuance of the trade.

I think, therefore, that if the participation in the profits is concluded by the decree, the extent of that participation in the profits subsequently made, is a matter left wholly open to be now decided.

I am also of opinion, that it now appears, and, as I believe for the first time, certainly in any authoritative form, that the capital possessed by the firm, on the decease

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decease of the testator, was very inconsiderable, and that the principal source from whence the subsequent profits of the trade were derived was the *goodwill*.

This point does not seem to have been urged at the hearing, nor, indeed, could it properly have been then brought forward. In the reports of this case, the arguments of Counsel are omitted altogether before Lord *Langdale*, and very imperfectly given before Lord *Cottenham*; but in the judgments of Lord *Langdale* and of Lord *Cottenham*, it does not appear, that the Court directed its attention to the provisions contained in the articles of partnership on this subject, nor could it, I think, have formed a proper topic for discussion, until it had been ascertained what the facts were, which shewed the real state of the firm and whence the subsequent profits had been derived.

That this is a most material ingredient appears from the cases to which I have been referred. It is specially noticed by Vice-Chancellor *Wigram*, in his judgment in *Willett v. Blanford*(a). "Again (he says), the whole, or the substantial part, of a trade may consist in *goodwill*, leading to renewals of contract with old connections. In such a case, it is the identical source of profit which operates both before and after dissolution; and this appears to me (he observes) to be the groundwork of Lord *Eldon's* reasoning in *Cook v. Collingridge*." Here the Vice-Chancellor is speaking of a case where the *goodwill* survives; and so speaking, he observes, that as it produces the profits, the deceased partner's estate is entitled to that share of them which corresponds to his share in the *goodwill*. The converse exactly holds true, that where the *goodwill* does not survive, the deceased partner's estate is entitled to no share of the profits

(a) 1 *Hare*, 270.

profits derived from this source. The *goodwill* was, in my opinion, in the present case, if not the sole source of profit, at least so substantial a part of it, that the amount of profit to be attributed to the ships, the lease of the counting-house, the goods and government funds (*a*), which were the only available capital, sink in comparative insignificance, and would probably not exceed in amount the interest paid on the 55,100*l.*, at which the testator's share was valued.

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I regret much the great delay which has occurred, and the great expense occasioned by this suit, and above all, I regret that the repeated suggestions of Lord *Langdale* and Lord *Cottenham*, advising the parties to compromise their differences, has not been acted upon; but having to adjudicate on the whole matter before me, the facts being now first brought before the Court in a clear and authentic form, I am bound to deal with the case in the manner I consider most in accordance with the doctrines and rules of equity, regardless of the consequences. Having regard to all the circumstances of the case, to the peculiar difficulties in which the executors and surviving partners were placed, from the position and embarrassment of the firm,—having regard to what was, at the death of the testator, most for the interest of the *cestuis que trust* under his will, and considering that it now appears, that they adopted the only course which could be usefully taken for this purpose, and that it was essential, for this purpose, that they should themselves carry on the trade, I should, I say, having regard to all these circumstances, have hesitated, even if the partnership articles had been silent, whether the rule, entitling the *cestuis que trust* to a participation in the profits subsequently realized, was strictly applicable to this case. But even if this were so, having regard

(*a*) See *antl*, p. 92.

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regard to the articles of partnership, which provide, that the goodwill of the trade shall survive to the surviving partner, from and after the 1st day of *May* next after the decease of the testator, and having regard to all the other circumstances to which I have referred, I am of opinion, that this is not a case, in which the Plaintiffs are entitled to participate in the profits, made by the subsequent carrying on of the trade by the successive firms, so far as those profits are attributable to the goodwill and connection in trade of the old firm; and that their share in that portion of the profits in which they would be entitled to participate, cannot be estimated higher, than what has already been covered by the payment of the interest on the amount at which the share of the testator had been valued.

I, at one time, considered, that it might be proper to direct an inquiry, to ascertain how much of the profits subsequently realized by these firms was properly attributable to the *goodwill*, and that the evidence of merchants might possibly be useful, in assisting the Court in coming to something like a proximate result; but on reflection and re-perusal of the evidence, I doubt whether more light could be thrown on that subject, than what is already given by the testimony of the merchants who have been examined. On consideration of that testimony, I have come to the conclusion, that, substantially, all the profits subsequently realized are attributable to this source, and that, so far as my judgment is concerned, the Plaintiffs could derive no benefit from such an inquiry, which I have, therefore, thought fit to abstain from directing.

I have, as I have already observed, taken the general view of the whole case, rather on further directions than on the particular exceptions. With regard to the exceptions,

ceptions, I think it unnecessary to go through them in detail. Generally, I agree with the Master in all his findings, and I am disposed to disallow all the exceptions. On the first and important one, as to the value of the testator's interest on the 1st of *May*, 1801, which the Master has found at the amount at which the executors took it, I do not see how the Master could have come to any different result. I have already stated the different views in which that question of value might be regarded, viz., the value at which the executors and surviving partners were willing to take it, and the value of it in the market and a sale. In the former sense, it was worth to the surviving partners, and they made it realize that amount; in the latter sense, it was worth nothing. I, at one time, felt disposed neither to allow nor disallow that exception; but on the whole, I think it desirable to let the Master's report stand as it does.

It follows, from all I have said, that the Plaintiffs' exception, contending that the value of the share of the testator *David Webster*, on the 1st of *May*, 1801, was 57,833*l.* 1*s.* 2*d.*, instead of 55,101*l.* 1*s.* 2*d.*, cannot, in my opinion, be sustained. I shall, therefore, confirm the Master's report *simpliciter*, disallowing all the exceptions on both sides, having endeavoured to state fully the views I take of this case, and proceeding, as I do, on the general merits of the case, deducible from the facts before me, apart from any technical rules or distinctions.

The result will be, that I shall overrule all the exceptions of both Plaintiffs and Defendants; that on the further directions, I shall make a declaration, that, having regard to all the circumstances of this case now appearing upon the Master's report, the Plaintiffs are not entitled to participate in the profits made of the trade,

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trade, as the same have been, from time to time, carried on by the successive firms of *Wedderburn & Co.*, *Wedderburn, Colville & Co.*, *Colville, Wedderburn & Co.*, and *Colville & Co.*, to any greater extent than the amounts already paid or accounted for to them, in respect of interest on the sum of 55,101*l.*, at which the share of the testator *David Webster* was estimated.

I shall give no costs of the exceptions, and no costs of the suit.

It will be understood, from what I have said, that I do not, in coming to the conclusion I have expressed, intend, in the slightest degree, to infringe on the rules of the Court, relative to the liability to account for subsequent profits, which attaches to executors who carry on trade with their testator's assets, or that of a surviving partner, who carries on business with the capital of a deceased partner. The circumstances of this case are most peculiar, and I found my decision on them alone, and I have the satisfaction to consider, that my judgment will, in all probability, undergo the careful revision of a superior tribunal, which will correct any errors into which I may have inadvertently fallen. I have, however, taken a long time to reflect upon my judgment, and I have considered the case in various points of view, and under many difficult aspects, and it is, with a sincere desire to carry into effect the principles of equity, and to do justice between the parties, and in the belief that I have done so, that I have pronounced this decision.

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NOTE.—The Plaintiffs appealed to the Lords Justices, but the suit was compromised. (December, 1856.)

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*April 16.*

**T**HE facts of this case were very complicated, but the following statement is sufficient for the purpose of explaining the decision, which is merely one of pleading and practice.

The Plaintiffs and Defendants were interested in some leasehold collieries, which were worked upon the terms of articles of partnership, dated the 13th of *February*, 1818. By these articles, the partnership in working the collieries was to continue during the remainder of the lease, of which about fifteen years were unexpired. The articles contained an agreement "between all the parties, that in case any one or more of them should, at or previous to the expiration of the said term of fifteen years, obtain or procure any fresh or renewed lease of all or any of the mines, seams and beds of coals or collieries within the said township of *Cliviger*, such lease, and all interest, benefit and advantages to arise or accrue therefrom, should belong to and be enjoyed by all and every

The Plaintiffs and Defendants were partners in a colliery, the lease of which expired in 1846. The Defendants gave notice to dissolve at the expiration of the old lease, and they obtained a renewal to themselves. The Plaintiffs insisted that they were entitled to participate in the new lease, and stated facts in support of that equity. The Defendants, by answer, denied the Plaintiffs' right, and declined to set out the accounts of the subsequent

profits of the colliery, or to produce the documents subsequent to the dissolution, which, they said, did not tend to shew the Plaintiffs' right to a decree, until the Plaintiffs had established some right in the new partnership. Held, that they were bound to answer and to produce.

Where the Defendant, neither pleading nor demurring, answers the bill, he must answer fully; but there are exceptions to the rule, as where the Defendant sets up a distinct and independent title in himself, which, if established, will destroy the Plaintiff's title. In that case, he is not bound to produce or set out any documents which he swears establish his own title, and do not establish that of the Plaintiff. Cases where the discovery would subject the Defendant to penalties and forfeitures are also exceptions to the rule.

The expression, "tending to make out the Plaintiff's title," means, his title to the relief which he seeks by his bill.

Questions of insufficiency of answer and production of documents rest on the same grounds, and must be dealt with in the same way.

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every of the parties thereto, their respective executors, administrators and assigns, in such shares and proportions as were thereinbefore expressed."

The partners worked the collieries, and having, during the fifteen years, obtained a renewal, they continued to work the collieries, which were managed by *James Collinge*, on behalf of all parties, who was paid a salary for his services.

On the 6th of *July*, 1846, shortly before the expiration of the principal lease (29th *September*, 1846), the Defendants gave the Plaintiffs notice to dissolve the partnership on the 30th of *September*, 1846. On the 29th of *September*, 1846, the whole stock of the collieries was sold by auction, and purchased principally by the Defendants.

On the 11th of *December*, 1846, the Defendants, (in pursuance of arrangements made with the lessor on the 11th of *December*, 1846,) obtained a new lease of the collieries. They continued to work the same, and made a considerable profit. The Plaintiffs, by this bill, sought, in substance, to participate in the benefits of the new lease, and the profits of the working of the collieries (*a*). It alleged, that previous to the expiration of the old lease, the renewal was a matter of consideration amongst the parties, and that it had been agreed by all parties consulted, that it was expedient to obtain a new lease. It alleged, that applications had been made to the lessor, who was not unwilling to grant a renewal, and a promise was obtained from him of the grant of a new

(*a*) See *Clegg v. Fishwick*, 1 *Mac. & Gor.* 294, and 1 *Hall & Twells*, 390.

new lease, as soon as some preliminary arrangements with his superior landlord could be perfected.

The bill alleged, that the Defendants had previously formed a scheme to appropriate the new lease to their own use, and exclude the Plaintiffs therefrom, and that such transactions were in violation of their duties towards such parties, as well under the articles as independent of them, and was a fraud on the parties sought to be excluded.

It alleged, that the Defendants had in their possession books and papers, &c., "connected with, mentioning, referring or relating to the matters therein mentioned, which they refused to produce."

The bill prayed declarations, that the renewed lease was subject to the articles of 1818, that the dissolution was not binding, that the Plaintiffs were entitled to share in the partnership, and it prayed for an account of the machinery, &c., and of the profits of the mines, and other consequential relief.

The 18th interrogatory asked for an account of the profits of the mines, "since the transactions of the year 1846," and for the accounts in writing, shewing the divisions of profits and the existence of undivided profits. The 24th and 25th interrogated as to the possession of documents, and required a schedule thereof.

The Defendants denied the Plaintiffs' right, and, in answer to the 18th interrogatory, "submitted, that they were not bound to answer the 18th interrogatory, until the Plaintiffs had established, and which they denied, that they had some right or interest in the new partnership." They admitted they had made profits, and they said,

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said, "that to state such account of profits as were required by the 18th interrogatory would involve great labour and expense, and the dissection of voluminous accounts, extending over many years, relating to matters in which, they submitted, the Plaintiffs had no interest whatever."

As to the books and papers they referred to their affidavits made on the subject, under the 15 & 16 *Vict.* c. 86, s. 18, and insisted that they were not bound to produce those in the second part of the first schedule, believing that they did not "tend to shew the Plaintiffs' right to a decree in this suit, but related exclusively to matters in which, they submitted and insisted, the Plaintiffs had no interest." In their affidavit they said, they were advised and believed, that those documents would not assist the Plaintiffs in making out their title to the decree prayed by their bill, inasmuch as they related exclusively to the business since the year 1846, and in which they denied that the Plaintiffs had any interest whatever, and which documents contained no entries whatever relating to any business transactions prior to the 29th day of *September*, 1846. And they submitted, that the Plaintiffs were not entitled to the production thereof, until they had established (and which they denied) that they had some interest in the lease or the workings of the said collieries.

The case came on upon exceptions, and by arrangement, as to the right to production.

Mr. *R. Palmer* and Mr. *Little*, for the Plaintiffs. The Defendants have neither pleaded nor demurred to the bill; they have undertaken to answer, and the rule is perfectly settled, that if a Defendant answers at all, he

he must answer fully; *Mazarredo v. Maitland* (*a*). He cannot, by denying the Plaintiffs' title to relief, escape the discovery. *Adams v. Fisher* (*b*), was a case of production and not of discovery, and has not been followed; *Swinborne v. Nelson* (*c*); and see *Whistler v. Wigney* (*d*).

In *Anon. v. Harrison* (*e*), "a bill was filed stating a partnership, and praying an account. The Defendants, by their answer, denied the partnership, and refused to set forth any account. Exceptions were taken to the answer, for insufficiency, in not having set forth the accounts. The Vice-Chancellor said:—That point is settled. If a Defendant answers, he must answer fully. They should have pleaded."

Secondly. It cannot be said, that the discovery is immaterial, for the Plaintiffs may at the hearing adopt the accounts so given, and then take a decree on the footing of the accounts rendered by the answer, thus avoiding the necessity of a reference to take the accounts. This appears from *Rowe v. Teed* (*f*). There the bill was for the profits of a privateer; the Defendant admitted the original title of the Plaintiff, but insisted on a sale by the Plaintiff to the Defendant on the 12th of June, 1805. The Defendant gave an account of the prizes captured down to that period, but insisted that he was not bound to set forth an account as to the subsequent period, during which the Plaintiff was not an owner; but it was held, he was bound to answer. Lord Eldon observed (*g*):—"Generally (admitting there are exceptions) the practice of this Court requires, that the bill and the answer should form a record upon which a complete

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(*a*) 3 *Mad.* 66.  
(*b*) 3 *Myl. & Cr.* 526.  
(*c*) 16 *Beav.* 416.  
(*d*) 8 *Price*, 1.

(*e*) 4 *Mad.* 252.  
(*f*) 15 *Ves.* 372.  
(*g*) 15 *Ves.* 378.

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complete decree may be made at the hearing. If, for instance, this Plaintiff is a part-owner of the ship, he has a right to an answer that will enable him, if a certain sum is admitted to be due, to obtain a decree for that sum, if he is satisfied with that, and does not desire an account." That is precisely the present case, and governs it.

So in *White v. Williams* (*a*), Lord *Eldon* observes :— "It is not sufficient for the trustees to refuse to give information by their answer, farther than to enable the Plaintiff to go into the Master's office ; and it is not enough, that the answer gives a ground for an account in the Master's office, and that the Plaintiff is enabled to go there. I am clearly of opinion, that is not enough ; but they are bound to give the best account they can by their answer ; referring to books, &c., sufficiently to make them part of their answer."

They also referred to *Wedderburn v. Wedderburn* (*b*) ; *Morrice v. Swaby* (*c*).

Mr. *Selwyn* and Mr. *Roxburgh*, for three Defendants ; and,

Mr. *Rouppell* and Mr. *Giffard*, for a fourth Defendant, who had severed in his defence.

We admit that when a Defendant answers he must answer fully ; but the real question is, what is a full answer ? There must be and is some limit to the discovery to which a Plaintiff is entitled. It must be material to the title of the Plaintiff, and tend to assist him in obtaining a decree. In *Wood v. Hitchings* (*d*), it was held, that the rule that where a Defendant submits

(*a*) 8 *Ves.* 194.

(*b*) 2 *Keen*, 732, note.

(*c*) 2 *Beav.* 500.

(*d*) 3 *Beav.* 504.

mits to answer he must answer fully, does not apply, where the matter of discovery is immaterial to the relief sought by the bill. The accounts cannot assist in making out the Plaintiff's right to a decree, and they must be subsequently taken. In matters of this sort, the Court exercises a discretion. As to the discretion of the Court in such cases, Lord *Redesdale* observes (*a*) :— “Where a discovery is in any degree connected with the title, it should seem that a Defendant cannot protect himself, by answer, from making the discovery ; and in the case of an account, required wholly independent of the title, the Court has declined laying down any general rule, deciding ordinarily upon the circumstances of the particular case.” If there were no discretion, by a mere allegation of partnership, skilfully supported by other facts so as to prevent a plea or demurrer, the whole of the voluminous accounts of a banker or merchant might be insisted on by a mere stranger. In *Jacobs v. Goodman* (*b*), it was held, that “a Defendant need not set forth an account of the transactions of a trade, in which the Plaintiff pretends to have been a partner, if there is a clear denial of the partnership.” The Chief Baron said :—“ You are not entitled to an account unless there be a partnership, and your position is much too wide. At that rate, if an utter stranger were to file a bill against *Child's* shop, alleging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the Court will require an account, although the principal point in the bill is denied, but not in a case like this.” This Court will not, at this stage of the cause, allow a Defendant to be hampered by setting forth long and expensive accounts, which may turn out to be of no use, and may be required for the mere purpose of oppression.

In

(*a*) Page 312, 4th ed.(*b*) 2 Cor, 282.

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In the *Marquis of Donegal v. Stewart* (a), it was held, that “the answer need not set forth an account, where the ground upon which it is prayed is denied; as where the bill charged a dealing in pictures by commission, and the answer denied that; and stated, that the Defendant sold them to the Plaintiff in the course of his trade: and Lord *Loughborough* observed (b):—“The price given is no criterion of the value of any commodity; but especially not upon a dealing in pictures. I should open every tradesman’s books in *London*, if I was to compel this account, upon the allegation that he was dealing by commission. The answer positively denies this species of dealing, that would entitle you to an account in the real cost of the pictures. Till you establish that, I should think it very dangerous. The question upon a partnership has been decided in the case of *Sir James Cockburn v. Sir Lawrence Dundas*, where the Defendant denied the partnership.”

In the case of *The Attorney-General v. Thompson* (c), it was held, that the “Plaintiff is not entitled to discovery of documents, the right to the possession or inspection of which is not necessary to the proof, and is only consequential upon the existence of the title he claims, that title not being admitted.” The Vice-Chancellor *Wigram* says (d):—“It must be shewn that the document is of a character that it will or may give a discovery of the case or a portion of the case without proof of which the Plaintiff cannot have a decree.”

In *Stainton v. Chadwick* (e), it was held, that “where discovery is sought in relation to matters in which the Plaintiff has no interest, but as consequential or resulting

(a) 3 *Vesey*, 446.(d) 8 *Hare*, 112.(b) 3 *Vesey*, 447.(e) 3 *Mac. & Gor.* 575.(c) 8 *Hare*, 106.

ing from character or title denied by the answer, and not otherwise appearing on the record, the Plaintiff has no equity entitling him to discovery." Lord *Truro*, after going very carefully through the facts of the case, lays down, in very clear terms, the principle. He says (*a*) :— "There is no doubt, that where a discovery is sought in relation to matters in which the Plaintiff has no right or interest, but as consequential or resulting from a character or title attaching to the Plaintiff, if such right and character is denied by the answer, and does not otherwise appear on the record, the Plaintiff has no equity entitling him to the discovery."

It is clear from the observations of Lord *Cottenham* in *Adams v. Fisher* (*b*), that he did not consider a Plaintiff entitled to the production of documents where his title was denied, and the documents did not support that title.

Lord *Redesdale*, alluding to this point, says (*c*) :— "Thus, to a bill stating a partnership, and seeking an account of transactions of the alleged partnership, the Defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the Plaintiff was only his servant; and the Court, conceiving the account sought not to be material to the title, overruled exceptions to the answer, for not setting forth the account."

Sir *James Wigram* refers to the same point. He says (*d*) :— "First. Suppose the bill to state certain transactions in trade which had in fact been carried on by the Defendant, and to allege (untruly) that the Plaintiff was a partner with the Defendant in those transactions.

Suppose,

(*a*) 3 *Mac. & Gor.* 584.

(*b*) 3 *Myl. & Cr.* 544.

(*c*) Page 312.

(*d*) *Wigram on Discovery*, 2nd ed. p. 221.

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Suppose, further, the bill to contain a charge, that the Defendant had in possession books and papers relating to the transactions in question, and that, if the same were produced, the truth of the Plaintiff's allegation as to the partnership would thereby appear. Shall the Defendant, by answer admitting the trading transactions, but denying the partnership, be compelled to produce his books and papers relating to his private transactions, because the Plaintiff has alleged that they will evidence his case." He subsequently refers to a defence to such a bill by plea, accompanied by an answer, and observes (a):—"If an answer be necessary, the nature and extent of that answer must be the same, whether the defence be made by demurrer, plea or answer. It follows, therefore, that unless, in such cases, the Defendant be permitted by answer to demand the judgment of the Court, whether he should give the discovery or not, he must be wholly without the means of defending himself, although the Plaintiff might have no right to the discovery objected to."

"In the example first suggested, that of an alleged partnership denied by the answer, the Plaintiff is supposed to seek discovery in support of the case upon which he founded his title to relief. No reported case suggests itself to the Author precisely applicable to the example proposed; but he submits without any hesitation, that the Defendant would not, in such a case, be compelled to produce documents relating to his transactions in trade before the hearing" (b).

The present suit is so framed as not to be open to a demurrer, and the complexity is such, that it would be impossible to plead to it. Seeing that the Defendants are compelled

(a) *Wigram on Discovery*, p. 223. (b) *Ibid.* p. 224.

compelled to answer, and the utter inutility of the accounts in order to support the Plaintiffs' case at the hearing; the Court, in the exercise of its discretion, ought not to allow them to be insisted on at this stage of the cause.

By the 38th Order of *August*, 1841 (*a*), a Defendant may, by answer, protect himself from giving discovery.

The case of *Anon. v. Harrison* (*b*), is very shortly reported. There must have been a charge in the bill, which is adverted to in some of the cases, that the production of the account would make out the fact in dispute, viz., the partnership.

They cited *The Marquis of Donegal v. Stewart* (*c*); *Phelips v. Caney* (*d*); *Webster v. Threlfall* (*e*); *Lancaster v. Evors* (*f*).

They also contended, that the facts shewed that the dissolution was valid and effectual, and that the Plaintiffs, after the great laches, could not maintain the claim to participate in the profits of a mining concern, which was of an uncertain and perilous nature. On this they cited *Norway v. Rowe* (*g*); *Prendergast v. Turton* (*h*); *Senhouse v. Christian* (*i*).

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In this case I am of opinion, that the Defendants must answer this bill. I shall not go at all into the consideration

(*a*) *Ordines Can.* 175.

(*f*) 1 *Phillips*, 349.

(*b*) 4 *Mad.* 252.

(*g*) 19 *Ves.* 158.

(*c*) 3 *Ves.* 446.

(*h*) 1 *Younge & C. (C. C.)* 98.

(*d*) 4 *Ves.* 107.

(*i*) 19 *Beav.* 356, note.

(*e*) 2 *Simp. & St.* 190.

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sideration of whether the Plaintiffs will be entitled to any decree at the hearing of this cause, or into any question with respect to lapse of time, or the particular facts of this case upon which the Defendants found their defence, further than as they bear upon the question whether the Defendants are bound to answer the bill or not.

It is a general principle, that a Defendant who answers must answer fully. That is admitted to be a general principle ; and therefore it lies upon a Defendant to shew that his particular case comes within some exception to that general rule. When a Defendant does not demur to a bill, he may be taken to admit, that if all the facts which are alleged in the bill are proved, as there alleged, and nothing shewn to displace the effect of them, the Plaintiff will be entitled to some relief. So also, if he dispute the case of the Plaintiff by the introduction of a single fact, or by separate facts leading to one general issue, then the proper defence to make is by plea ; but if he answer, the rule is that he must answer fully. It is admitted, that there are many exceptions to that rule; and the question is, whether this case comes within any of those exceptions. One very common exception is, where the Defendant sets up a distinct title in himself, totally independent of the title of the Plaintiff, and which, if established by evidence, will destroy the title of the Plaintiff. In such a case, he is not bound to produce or set out any documents which, as he swears, establish his own title, and do not establish the title of the Plaintiff. There is a great number of cases, no doubt, in which the Plaintiff states, that there are documents in the Defendant's possession which establish the Plaintiff's title ; but if the Defendant swear positively, that those documents do not relate to the title of the Plaintiff, but that they establish

establish the title of the Defendant, the Court gives credit to the allegation in the answer, and the Defendant is not bound to produce those documents. I state those cases, because I adhere to the observations I made in *Swinborne v. Nelson* (*a*), that, in my opinion, questions of exceptions to answer and of production of documents rest on the same grounds, and that they must be dealt with in the same way.

There are other cases, but it is unnecessary for me to go through them; one exception is this, where the answer would subject the Defendant to particular penalties or forfeitures; that is also an objection which may be taken by answer (*b*).

The case which arises here is this: a title is set up in the Plaintiffs which is denied by the Defendants, it is then said, that the title being denied by the Defendants, the Plaintiffs are not entitled to any of the relief consequent upon that denial, nor are they entitled to any discovery except such as shall aid in making out their title. There is a good deal of obscurity, in the cases, as to what is meant by "making out the Plaintiff's title." I apprehend it means, the title to the relief which he seeks by this bill. In the ordinary case of a Plaintiff coming against the person in possession of an estate, alleging that the owner last seised died intestate, and left the Plaintiff his heir at law, if the Defendant denies that the Plaintiff is his heir, he is not bound to set forth any of the deeds or papers in his possession, which shew his title to the property, provided he is prepared and able to support his resistance to the production of those documents, by swearing that they in no

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(*a*) 16 *Beav.* 416.

(*b*) See *Wich v. Parker, ante*, p. 57.

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no respect make out the title or heirship of the Plaintiff.  
That is an ordinary case.

In the case of a partner, Lord *Redesdale*, in the passage which Mr. *Rouell* has cited to the Court, says "that the Court has declined laying down any general rule, deciding ordinarily upon the circumstances," that is, on the facts of the particular case. And a passage has been cited by Mr. *Giffard*, from Sir *James Wigram's* book (*a*), in which I am fully disposed to concur, namely, that if a Plaintiff were to file a bill against a certain person carrying on trade, alleging a partnership and asking for the accounts, and the Defendant denied the partnership altogether, and at the same time said, that the accounts did not shew any partnership whatever, he might be able to protect himself as well by answer as by plea.

But the present appears to me to be very distinct from that case. In the first place, this is not a case in which the partnership is denied, that is to say, the original partnership; but on the contrary, the original partnership is admitted. If the answer here had said, "the Plaintiffs never were partners in the carrying on of this mine, and they never had anything to do with it, but were mere strangers to the whole transaction, and we have no documents or papers in our possession to shew the contrary in any respect whatever," then I am disposed to think, that the case would have arisen which is stated in Sir *James Wigram's* book, and which, in fact, is what has been principally argued at the Bar on behalf of the Defendants, with great ability and very strenuously, but which, in my opinion, does not arise in the particular facts of this case. In this case, the original partnership being admitted, if that is not dissolved, the whole of  
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(*a*) Pages 221, 224.

the trade which has since been carried on, has been so carried on for the benefit of the persons who are partners.

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Then it is said, that the partnership has been put an end to, under such circumstances as do not entitle the Plaintiff to be treated as a partner or as a *cestui que trust*, in respect of the business carried on subsequently to a particular period. The business has never been intermitted, as I understand from the statement on both sides: the business has been carried on from the time when it is admitted that the Plaintiffs were partners continuously down to the present time. The Defendants however allege, that at a particular time the right of the Plaintiffs ceased, and the profits of the trade belonged exclusively to the Defendants. That is a case for them to establish by evidence, and if they had said, we have in our possession certain documents which establish our case, but do not, in any respect, assist the case of the Plaintiffs, that might be a reason why I should not require the Defendants to produce what was merely the evidence required to support their case at the hearing of the cause.

It is to be observed, that a considerable distinction exists in these cases. I may refer to one in the matter of tithes, which, according to my recollection, is one of the cases that Lord Redesdale refers to. If a person file a bill for an account of the ordinary tithes to which the rector would as of right be entitled, the Defendant is bound to set out, not only an account of the lands, but an account of the tithes, and it is not sufficient for him to deny the title of the Plaintiffs (*a*); but if the title to the tithes is not a matter of common right,  
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(*a*) See *Whistler v. Wigney*, 8 Price, 1.

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but depends upon a particular custom, such as tithes of fish or rabbits, then the same rule does not apply ; but a denial of the right of the Plaintiff puts him upon the necessity of establishing his right, and it is not incumbent upon the Defendant to set out the same account of tithes. According to my recollection, that distinction is taken by Lord *Redesdale* in his book upon this subject.

It is to be observed, therefore, that this is not a case in which the original title to relief of the Plaintiffs is denied, but in which a separate and distinct title is set up for the purpose of shewing that the right of the Plaintiffs stopped at a particular period : therefore, in my opinion, this is not a case in which authorities can be referred to (if such authorities exist, and are not overruled at the present day) for the purpose of shewing, that a denial of the Plaintiff's title constitutes a right in the Defendant to withhold any information of the subject. This is not a denial of the title of the Plaintiffs, but an assertion of something which, at a particular period, concludes and displaces an admitted title in the Plaintiffs, and which is, therefore, perfectly distinct from that class of cases which have been referred to.

If necessary to refer to them, I think that it would be difficult to distinguish this case from *Rouce v. Teed* (*a*), to which this case bears a strong resemblance in many respects, although they are perfectly distinct with respect to the subject matter.

It is then contended, that the Plaintiffs are not entitled to this discovery, because it will be immaterial at the hearing of the cause, and that, therefore, the Defendants may

may resist the production of the information. But what I understand by that is such a case as *Webster v. Threlfall* (*a*), where whatever information you give by the answer, it can, in no degree, assist the Plaintiffs in obtaining a decree at the hearing. But this case does not fall within that principle, because, assuming that the Plaintiff, at the hearing of the cause, proves the existence of the partnership and the amount of his share, and that he thereby establishes his title to the relief which he seeks, he may be entitled to say, "I will take a decree for the amount of profits admitted by the Defendants, without taking the account;" or he may find by the answer, the amount of profits so small, that it may not be worth his while to proceed with the suit. That cannot be stated to be immaterial to the Plaintiffs' case: the observation of Lord *Eldon* in the case of *Rowe v. Teed* (*b*), expressly meets this particular point, on the principle that the Court is desirous of giving complete relief at the time when it pronounces the decree in the first instance; for an account is only directed, because the Court finds its inability, upon the evidence before it, to give complete relief. In many cases, the Court has that power, as in the case of a creditor who proves his debt at the hearing against the executors who admit assets, in which case, the creditor is entitled to a decree at once, without the expense or trouble of going through the accounts.

The Defendants have failed in satisfying me, that it would not, under any circumstances, be possible to give that relief on the present occasion. I admit the improbability, in a case of this description, of giving such relief; but in looking at cases of this nature and deciding them

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them upon principle, I must consider, not the extent of probability, but whether it is not possible for the Court to give such relief. The Plaintiff states what is the amount of his share; I assume for this purpose, as I am bound to do, that he establishes at the hearing, what the amount of his interest is, and who are the other persons interested, and that then he shews, by the answer of the Defendants, the amount of profits which have been made: he may then say, "I will take my proportion, whatever it may be, at once, and the other persons interested may then either accede to that amount or take the accounts." The Plaintiffs might then take their share of what the Defendants were willing to admit was the amount of profits they made.

I am of opinion, therefore, that this is a case in which the Defendants are bound to give the information which is required by the bill, and also to produce the documents mentioned in the particular schedule.

NOTE.—Upon appeal to the Lords Justices, it was arranged that notice of motion for a decree should be given. (5th June, 1856.)

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*In re THE NORWICH YARN COMPANY.**Ex parte BIGNOLD.**May 1, 2, 3,
28, 31.*

THIS case came before the Court, on appeal from the Master's certificate.

The Solicitor-General (Sir R. Bethell) and Mr. Cole, in support of the motion.

Greenwood's case (a); Bank of Australasia v. Breil-lat (b); Ex parte Chippendale, In re German Mining Company (c).

Mr. Roupell, Mr. R. Palmer and Mr. Bush, for the Official Manager, and representing the contributories.

Rothwell v. Humphreys (d); Re The Norwich Yarn Company (e); Ex parte Bonbonus (f); Sandilands v. Marsh (g); Fisher v. Tayler (h); Dickinson v. Valpy (i); Tredwen v. Bourne (k); Hawtayne v. Bourne (l); Hawken v. Bourne (m); Ricketts v. Bennett (n); Bramah v. Roberts (o); Greenwood's case (a); Gillan v. Mor-

Directors of a trading company incurred a large debt to the bankers beyond the subscribed capital. Held, that they were entitled to be repaid by the company by means of a call, with simple, but not compound, interest, or with rests as charged by the bankers.

Some of the clauses in a public company's deed of settlement are directory and some imperative. A deviation in the former may be sanctioned and confirmed by a general meeting of shareholders, but the latter cannot, unless with the assent of every individual shareholder.

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| (a) | 3 De G., M. & Gor. 459. | (h) | 2 Hare, 218. |
| (b) | 6 Moore, P. C. C. 152. | (i) | 10 B. & C. 128. |
| (c) | 4 De G., M. & Gor. 19. | (k) | 6 M. & W. 461. |
| (d) | 1 Esp. 406. | (l) | 7 M. & W. 595. |
| (e) | 13 Beav. 426. | (m) | 8 M. & W. 703. |
| (f) | 8 Ves. 540. | (n) | 4 C. B. 686. |
| (g) | 2 B. & Ald. 673. | (o) | 3 Bing. N. C. 963. |

By the deed of settlement of a joint-stock company, all cheques on the bankers were to be signed by three directors. Held, that this was directory and not imperative, and therefore, that the directors were entitled to be allowed any sums drawn from the bankers by cheques not properly signed, if bona fide applied for the purposes of the trade.

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The Master of the Rolls reserved judgment.

May 31.

The Master of the Rolls.

This case came before me on appeal from the Master's certificate, regulating the rights as between themselves, of the Directors of the *Norwich Yarn Company*, and their co-proprietors.

The company was projected and set on foot in the year 1833, by several of the influential inhabitants of the city of *Norwich*. Their principal object seems to have been, to relieve the distress, which at that time afflicted the poor of that city, by opening to them the means of employment, by the establishment of an extensive manufacture for converting wool into yarn; and for this purpose, their design was to raise 30,000*l.* by three hundred shares of 100*l.* each.

The affairs and conduct of the company, and the liability and rights of the proprietors, were regulated and prescribed by a deed of the 2nd of *August*, 1834. Although charity had a large share in the motives for the establishment of this company, the profitable invest-

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| (a) 1 <i>De G. & Sm.</i> 421. | (e) 6 <i>Moore, P. C. C.</i> 152. |
| (b) 3 <i>De G., M. & Gor.</i> 180. | (f) 4 <i>De G., M. & Gor.</i> 19. |
| (c) 1 <i>Y. & C. C.</i> 98. | (g) 1 <i>Car. & Kir.</i> 335. |
| (d) 1 <i>Hull & Tw.</i> 320, and 1
<i>Muc. & Gor.</i> 225. | (h) 5 <i>De G., M. & Gor.</i> 284. |

ment of money was not disregarded; and it is assuredly a principle inseparable from this, as from all similar undertakings, that the public benevolent and charitable object will fail, unless the private and profitable one be also accomplished. They are in fact inseparable, and unless the company be so established and conducted as to become profitable to the proprietors, it is likely, if not certain, in the end, to aggravate rather than allay the particular evil it was intended to remove. Unfortunately, the skill with which this company was constituted did not equal the benevolence of the motives which projected it. It was provided, by one of the clauses of the deed (102), that no person should be a director who had any practical knowledge of the manufacture about to be established; though the primary object of the scheme was, to employ, and, for this purpose, to instruct in the business, the poorer inhabitants of the city of *Norwich*, where, at that time, no such business seems to have been carried on; and who were consequently ignorant of the process by which such a manufacture was conducted. The result of an undertaking established on such principles might easily have been foreseen. It struggled on with increasing difficulties for sixteen years, till at last, in the year 1850, it was wound up, by order of this Court, under the statute, in a state of insolvency. The whole of the original capital was gone, and a debt of 32,000*l.* contracted with the *East of England* Banking Company, the bankers of the company. The property of the company has been sold for 17,000*l.*, and of this, the sum of 12,000*l.*, or thereabouts, alone remains towards paying this debt to the bankers, assuming it to be applicable to this purpose.

Under the winding-up orders, the bankers claimed to be creditors for this amount against the company; the

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allowed their debt. On appeal to Lord Brougham he expressed no opinion on the point, but directed the bankers to bring an action at law, and to sue for payment but not a proof of debt, in the mean-time, reserving his opinion as to the result of the action. This, on appeal to the Court of Appeal and the House of Lords, was affirmed; and one of their lords expressed an opinion, that on the evidence then before them, if compelled to come to a conclusion, he would have concurred with the Master. The bankers commenced an action accordingly, but on reflection, finding that there was no doubt as to the individual liability of the directors, or of their capacity to pay, they abandoned the action against the company, and enforced their demand against the directors; the result of which has been, that the claim of the bankers against the company has been expunged, and the directors have paid or given security for the debt to the banking company, and put themselves in the same situation as if they had advanced this money for the purposes for which it was applied. In this state of things, the directors applied to the Master to make a call on their co-proprietors, in order to reimburse them what they have paid, or have rendered themselves liable to pay, to the banking company. The co-proprietors, on the other hand, seek to throw the whole debt on the directors, and to divide the surplus of the money arising from the sale of the partnership property between themselves, in proportion to their subscriptions.

The Master has made his certificate, refusing to make any call on the co-proprietors to relieve the directors, but permitting them to apply the surplus money arising from the sale of the partnership property in discharge, as far as it will extend, of their payment or liability to the

the bankers. Both parties object to the Master's decision, and cross motions to vary his certificate have been given and argued before me immediately before the close of the last term. Both motions involve the same questions, and have been argued as one; indeed, the cross motion of the co-proprietors is rather in the nature of defence, to prevent the directors from succeeding in enforcing a contribution from them.

The first motion, on behalf of the directors, insists on their right to contribution. The cross motion, by their co-proprietors, insists that the whole debt due to the bankers must be borne by the directors themselves, and that the surplus money arising from the sale of the property of the partnership ought to be divided amongst them, and not retained by the directors, or applied by them in discharge of the sums they have already paid or secured to the bankers. Assuming that the money advanced has been applied *bonâ fide* for the purpose of the partnership, *prima facie* the directors would be entitled to have the amount repaid to them.

The ground on which the proprietors found their defence to the claim of the directors is two-fold:—

First, they contend that, according to the partnership articles or deed of 2nd *August*, 1834, the liability of the shareholders, as between each other, is limited to the amount subscribed, and that if the directors have spent more, they have thereby acquired no right to contribution from their co-proprietors beyond their original subscriptions.

Secondly, they contend, that the conduct on the part of the directors, in the management and carrying on of

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the concern, disentitles them to any contribution. Their conduct, it is alleged, was in violation both of the express and of the implied contract on which the partnership was founded ; that is, that the conduct of the directors was contrary to the provisions of the partnership articles or deed regulating the affairs of the company, which was the express contract ; and that it was also so negligent, reckless and improvident and even, to some extent, fraudulent in matters not expressly provided for in the partnership articles, but which are regulated by the general scope and object of such a partnership and the rule of law applicable to such matters, (all of which constitute the implied contract under which all such partnerships are conducted,) as to disentitle the directors to any contribution or claim against their co-proprietors, in respect of the debt incurred by them to the bankers.

The directors take issue on these facts ; they deny that their conduct was contrary to the written contract by which the company was formed, and they deny that they were guilty of any misconduct in the management of the concern, which, they say, was carried on by them *bona fide*, in the best way they could for the interest of the proprietors. But were it otherwise, they allege, that their mode of conducting it was fully laid ✓ before the general meetings of the proprietors, and sanctioned and approved by them, and that the co-proprietors are bound thereby.

In answer to this, the proprietors allege, that full disclosure of the state and circumstances of the concern was not made to the proprietors generally, or to any general meeting ; but that important facts were suppressed or concealed : and that even if such disclosure had been made, it lay not within the competency of

a general meeting to bind the absent proprietors in such matters : that all the proprietors of the company were bound by the provisions of the deed, that they relied on the contract thereby entered into, and that no majority could bind a minority in such matters.

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These matters were fully discussed before me. The evidence was read and commented upon on the 1st, 2nd and 3rd of this month, but, at my suggestion, the *Solicitor-General* postponed his reply, because I was desirous, before I heard any reply from him in this case, to read and consider, more carefully in private than I was able to do in public, the deed of constitution of the company and the evidence adduced on each side : having now had this opportunity, I have come to certain conclusions which supersede the necessity of calling upon the *Solicitor-General* for a reply on any part of the subject, except that which relates to compound interest. These conclusions I am about to express.

The first question is the construction of the deed, as regards the extent of the liability of the shareholders. I shall presently have to consider the provisions of the deed with reference to the conduct of the directors, but the first question, which depends upon whether the liability of each proprietor to contribute is or is not limited to the amount subscribed by him, is wholly independent of the question which arises as to the misconduct of the directors. It is argued (in my opinion with perfect correctness) that if several persons unite together in a joint undertaking or partnership, and, in doing so, contract between themselves that no one, except the managers, shall be liable beyond a given amount, this, although of no effect as regards strangers, is a perfectly valid and binding provision limiting the liability of the shareholders as between themselves ; and that it is not in

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1856. *In re* the power of any majority of the shareholders to bind a minority of them to any alteration of this provision. I concur in that argument. I am of opinion, (whatever may be the invalidity of such a provision as regards third persons, strangers to the concern, dealing with it,) that as regards the partners themselves, and between them, it is binding; and further, that it is of the essence of the contract between them; and that no minority or single member of the company or partnership can be deprived of the benefit of this provision, without his own express consent to the variation or abandonment of it.

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This, in fact, is all that is decided in the case of *Gillan v. Morrison* (*a*), and more particularly in that of *The Worcester Corn Exchange Company* (*b*). It remains to be considered, whether, according to the true construction of this deed, this is the contract between the parties to it.

The deed itself is an elaborate and carefully prepared instrument, intended, obviously, to supersede, as far as possible, all difficulty in ascertaining and regulating the rights of the proprietors as between themselves; the general scope of it is this:—

The 1st clause establishes the company. The 2nd specifies that the capital shall consist of 30,000*l.*, by three hundred shares of 100*l.* each. The 3rd specifies the object of the company to be to spin wool into yarn for sale. The 4th specifies who are to be the first officers of the company, viz., the directors, auditors, trustees, treasurer, the manager and secretary, and the solicitors. The 5th provides that the affairs of the company shall be conducted subject to the regulations

(*a*) 1 *De G. & Sm.* 421. (*b*) 3 *De G., M. & Gor.* 180.

regulations and clauses thereinafter contained. The **next** twenty-four clauses regulate the constitution, **proceedings** and powers of general meetings. The **next** sixty-seven clauses, from 30 to 96, both **inclusive**, prescribe the powers and duties of the board of **directors**, and regulate the mode in which the business **is to** be conducted. The clauses from 97 to 125 both **inclusive**, provide for the qualification, the mode of **creating** and supplying vacancies in the offices of **directors**, auditors and trustees of the company.

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The 125th provides, that the chairman, directors, **manager or secretary**, trustees and other officers of the **company** shall be indemnified, out of the funds or **property** of the company, against all loss and expenses **which** they may sustain or be put to by reason of any **acts** done by them in the management of the company, **unless** produced by their wilful neglect or default; **and** further, that each shall only be answerable for **his** own acts, and for the money actually received by **him**, and not for any loss, misfortune or damage which **may** befall the company, except the same happen by **or** through their own wilful neglects or defaults **respectively**.

This clause is relied upon, in conjunction with the clause I am about to refer to, as assisting the construction contended for by the co-proprietors. The argument is this:—that inasmuch as the directors are to be indemnified **out of** the property of the company, this is the limit and **measure** of their indemnity; but my opinion is, that this **clause** has little operation on the question, and that the **object** of the clause was to give the officers a lien for **their** indemnity on the property of the company, assuming that this would be amply sufficient; that the meaning of the clause is to confer a benefit, not to impose

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impose a restriction on the officers, and that the scope of it is to add to such rights as they would be entitled to, independently of this clause, a lien for their indemnity over all the property of the company.

The next thirty-seven clauses, from 126 to the 162nd, both inclusive, relate to the liabilities, rights and duties of the proprietors generally, and these clauses must be principally examined for the purpose of determining the present questions. The only remaining clause of the deed is the 163rd, which provides for referring differences amongst the proprietors to arbitration; the deed concludes with a witnessing part which confirms the acts of the directors up to the date thereof.

In examining the clauses relating to the proprietors, the 130th clause is that which is principally relied on by the proprietors against the directors, and the 160th clause is that which is mainly urged by the directors against the proprietors. It is material for the purpose of estimating their due effect and relative importance to see how they are introduced, and then how they are worded.

The first clause relating to the proprietors generally is the 126th. It provides for the payments to be made on the sale of the shares not then subscribed for, of which a few remained. The 127th clause provides, that the payments of the further instalments on shares already called for shall be made within two months. The 128th provides, that every proprietor shall pay every future instalment on or before the day specified, provided that at least thirty days shall have elapsed since the day appointed for the payment of a previous instalment. The 129th provides, that if the instalments are not paid, interest at 5*l.* per cent. per annum shall be paid until payment,

payment, with a power to the board of directors to remit the interest if they think fit.

Then comes the 130th clause, which is in these words:—"And in no case shall there be required, in respect of any one share in the capital of the company, more than the sum of 100*l.*, exclusive of the premium, when the same shall have been sold at a premium, or more than the difference between the amount of the discount and the sum of 100*l.*, when the same may have been sold at a discount, and no instalment hereafter to be called for on any one of the original three hundred shares shall exceed the sum of 10*l.*"

This clause does not appear to me to warrant the conclusion founded upon it. It follows others which relate to payment of instalments on shares, the first half of it has relation to the same subject, after which the clause provides that in respect of one share in the capital of the company, no more than 100*l.* shall be required, and it concludes by saying that no instalment shall exceed 10*l.* The clause, in my opinion, relates exclusively to the calls to be made for the capital of the company on the shares, and the object of it is to provide that, for the purpose of carrying on the business of the company, no call shall be made after the 100*l.* has been paid up; that is, that the subscribed capital of the company shall be 30,000*l.* in three hundred shares of 100*l.*, and that when each person has paid up his 100*l.* in respect of each share, he shall be called upon for no more; but it cannot, in my opinion, be reasonably contended that the construction of the clause, even when taken by itself but still less when taken in conjunction with the rest of the deed, is, that if liabilities are bona fide incurred, for which the company is liable, (all which must be assumed in trying this question of construction,) then

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then that the directors are personally to bear the loss, and that no part of it is to fall upon the other proprietors. This clause is general ; it applies equally to all, whether directors or not, but the construction sought to be put upon it would confine the benefit of the clause to the proprietors who were not directors. Assume for instance a debt to have been incurred *bonâ fide*, for which the company was liable, and a proprietor, not a director, to have been sued and judgment recovered against him ; it would be impossible that the directors could say, that by virtue of this clause, they who had contracted the debt were exempt from liability to contribution ; yet the argument would be the same, and ought to be equally valid in both cases. Neither, in my opinion, could the proprietor against whom such judgment was recovered, in the absence of misconduct on the part of the directors, insist that he was entitled to be repaid by them the whole amount of the debt. In the *Worcester Corn Exchange Company* (*a*), not merely the nature of the undertaking was very different, for that was not a trading partnership, but the clause was of a totally different character, and was not affected by any subsequent clause.

The subsequent clauses of the deed, relative to the proprietors, proceed to regulate the rights of the proprietors and their assigns, on death, transfer of share, and the like, and the mode of obtaining, preserving and producing the evidence of every person being a shareholder. The 155th provides, that the report of the directors at the annual general meetings shall, when approved in the manner there pointed out, be conclusive on the proprietors of the company. The 156th provides, that every proprietor employed by the company shall be faithful, and duly account to the board of directors,

and

(*a*) 3 *De G., M. & Gor.* 180.

and also in certain cases to a general meeting. The 157th provides, that no proprietor, except a director or one authorized by the directors, shall buy or contract on behalf of the company. The 158th provides, that each proprietor shall keep the funds of the company indemnified against his private or separate debts. The 159th provides, that no proprietor shall do any act, by which the property of the company shall be taken in execution, incumbered or affected. The 161st clause provides, that no proprietor shall avail himself of any technical objection which might be raised either at law or in equity, to avoid any action due from the proprietors to the company. The 162nd and last of this class provides, that every proprietor shall pay the money due from him to the company.

The 160th section, which I passed over, is in these words:—"That every proprietor of the company, his or her heirs, executors and administrators, as between him or her and all or any of the other proprietors of the company, and their respective heirs, executors and administrators, shall be answerable in respect of the call, debts and other demands of or upon the company, in proportion to his or her share and interest in the funds or property of the company, but not further or otherwise."

The clauses, therefore, which introduce and follow the 160th clause relate to the dealings of the company with strangers; the words of the clause itself are clear and unambiguous, and cannot, in my opinion, be controlled, unless by other words in opposition to them as clear and as distinct as they are.

It is the duty of this Court, as far as possible, to make all parts of this deed have a consistent and coherent meaning, and not to reject any portion of it.

Undoubtedly,

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Undoubtedly, if the 130th and 160th clauses are exactly opposite, I must adopt the earlier, and reject the latter; but they appear to me to be quite consistent. The 130th section, speaking of calls for the purpose of constituting the capital necessary to carry on the concern, says, that 100*l.* per share is to be the limit of the calls. The 160th clause, speaking of liabilities of the company and actions against the proprietors, provides, that each proprietor shall contribute sufficient to defray the liability, in the proportion of his share, but no further. No clause similar to this appears to have existed in the deed establishing the *Worcester Corn Exchange Company* (*a*); that case, therefore, does not govern the present, and unless this clause bears the meaning I have expressed, it has practically no signification. Assume in the present case that the debt due to the *East of England Banking Company* was a debt due from the company, to pay which each proprietor was liable at law, and that the *East of England Banking Company* had sued one of the proprietors, not being a director, and had obtained judgment and execution against him, could it be reasonably contended, while this clause existed, that none of the other proprietors were bound to contribute to defray the debt which had been recovered against one alone? I think not. It is also obvious, that the operation of the clause is not made to depend on the circumstance, whether there are or are not assets and property of the company which might be applied in payment of the debt, beyond the indemnity to the directors under the 125th clause.

On the first part of the argument, therefore, viz., the construction of the deed regulating the liability of the proprietors, as between themselves, and wholly independent of the conduct of the directors, I am of opinion,
 that

(*a*) 3 *De G., M. & Gor.* 180.

that with respect to debts *bona fide* contracted for the benefit of the company, for which the company is liable, the shareholders of the company generally, whether directors or not, are liable to contribute in proportion to their shares, although they have paid up the calls in full; and that under the provisions of this deed such debts do not fall exclusively on the directors, although contracted by them.

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It is true, that in the present case, it does not appear that the debt due to the *East of England Banking Company* was a debt for which the company was liable. It was disallowed by the Master: it has never been allowed by the Court. An opportunity was afforded the banking company of trying this question at law, which they have declined, and I must say for very obvious reasons, inasmuch as the banking company has been able to enforce payment or what is equivalent to it, from the individual directors who contracted the debt.

This will not affect the construction of the deed, but it has a direct bearing on the question whether this debt was *bona fide* incurred, and was one for which the company generally was liable.

This brings me to the second question, viz., the conduct of the directors themselves, and whether the contracting of this debt was in violation of the express or implied contract between the proprietors, and if so, whether it ought not to be borne by the directors personally, who contracted it. The written contract expressed the objects and purposes of the undertaking, from which, and as necessarily incidental to which, various contracts are implied which are unnecessary to be expressed. The written contract, that is the deed of partnership, contains express directions, some of which might

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The business expressed to be carried on was a joint stock partnership for spinning wool into yarn, it followed from thence, without being expressed, that it was not in the competency of the directors to convert the capital to a wholly distinct undertaking, as, for instance, a brewery, or a steam packet company (*a*); and further, that they were bound to devote a sufficient portion of their time and attention to the business of the undertaking, and further, that they were not to employ the property of the company in any manner for their own exclusive advantage. All this is implied without being expressed in the deed, and if they have contracted this debt by any such means, they cannot charge it against the proprietors. Although the affidavits are diffuse and argumentative, and deal liberally in the use of the words "fraud" and "fraudulent," neither when read in Court, nor in reading them since in private, have I discovered the slightest indication of any intention or attempt, on the part of the directors, to gain, by means of their management and employment of the funds of the company, the slightest personal exclusive benefit to themselves, nor was anything of this nature, in fact, suggested at the Bar.

I therefore discard altogether the question of fraud, of which there is not a vestige in the facts disclosed, but which, if it existed, would undoubtedly make the directors solely and exclusively liable.

With respect to the application of the funds of the company in any undertaking foreign to the objects specified in the deed of partnership, the evidence is meagre

(*a*) See *Colman v. The Eastern Counties Railway Co.*, 10 *Beavan*, 1.

meagre and obscure on this subject. What there is **appears** rather incidentally than directly; there is mention of an establishment to create steam power, on **which** money seems to have been spent, but to what **extent**, and whether forming part of this debt, I have **been** unable to ascertain. If part of this debt has been contracted for the creation or support of an establishment having no necessary connection with the objects of spinning wool into yarn, as specified in this deed, **that** part, in my opinion, cannot be charged against **any** proprietor who did not personally assent to such a **use** of the capital. On this point, therefore, if required, **or if** the parties cannot agree upon the facts, there must be **an** inquiry. There is nothing at present before me sufficiently definite on which to charge the directors. **The** remainder of the debt, or, if no part has been contracted in the manner last suggested, then, the whole of it **has** been contracted by the directors *bonâ fide*, for the purpose of carrying on the *Yarn Company*, for the objects specified in the deed of *August, 1834*. It is then necessary to examine the deed once more, for the purpose of ascertaining whether, in the mode of conducting this business, they have not contravened the provisions of the deed, to such an extent as to make them individually liable for the amount; and if this be established, then will follow the remaining question, viz., whether, assuming such original liability, they have been absolved therefrom by the acquiescence therein of the proprietors of the company assembled in general annual meeting; and further, whether the absent proprietors are affected thereby. In examining the deed for this purpose, it is important to bear in mind an important distinction pointed out by Sir James Wigram, in *Foss v. Harbottle* (a), and followed in subsequent cases, viz., that the forms prescribed by a deed of incorporation for the government

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government of a company are of two sorts, some are imperative, but others are only directory; some, in fact, are of the essence of the contract, and every thing done in violation of it is void; others are merely directory, and point out the mode by which the objects of the undertaking are to be accomplished.

The complaints made against acts committed by the directors, which are supported by any evidence are these:—

First, the incurring of any debt at all to the bankers.

Secondly, not signing cheques.

Thirdly, not having the accounts audited.

Fourthly, not giving sufficient and proper information to the shareholders.

With respect to the first and most important question, viz., the debt due to the bankers, it is argued that there are three classes of clauses which shew that this course of proceeding was contrary to the provisions of the deed. First, that class which states that the capital of the company shall consist of 30,000*l.*, and specifies in what manner alone more capital shall be brought into the concern, viz., by the creation of new shares, to be sanctioned by a special general meeting. Secondly, the clauses which point out that the trade is to be carried on by ready money and not on credit; and thirdly, the clauses which specify how loans are to be obtained when necessary.

With respect to the clauses relating to capital, they do not appear to me to affect this question. The distinction between subscribing capital to carry on a trade, and incurring debt for that purpose, is clear and obvious, and is marked throughout this deed. The amount

amount of capital subscribed, regulates the proportion in which the profits are to be divided, or the losses borne by the proprietors, and an addition of subscribed capital alters that proportion, but this is wholly distinct from the incurring of debts. Neither does it appear to me that the clause (63) (a), which specifies in what manner money is to be raised, affects this question. That clause relates to raising money by mortgage, or by pledging the partnership property, restrictions on which are placed, by requiring, for this purpose, the concurrence of a Board of Directors, consisting of not less than six. The clauses which do relate to this matter are the clauses from 52 to 55 inclusive, which direct how the business is to be conducted, and these appear to me to destroy rather than support the argument of the proprietors who contend that the directors were not at liberty to incur debts for the purpose of carrying on the trade. In the first place, it is to be observed, that this was an ordinary trading partnership, in which the giving and taking of credit seems to be an essential part, and would be implied, unless forbidden by the deed, but this is nowhere forbidden. On the contrary, the 54th and 55th clauses only recommend that sales and purchases shall be for ready money, leaving the amplest discretion in the directors to do what they may deem expedient.

“ 54. That the Board of Directors shall cause all sales to be made for ready money, except where the same

(a) “That it shall be lawful for the board of directors, from time to time, to raise by way of loan, at interest, on the security of the funds or property of the company or any part thereof, any sum or sums of money which such board shall think proper;

provided, nevertheless, that no sum or sums of money shall be so raised by way of loan, unless the same shall have been resolved on at a board of directors, at which six directors at the least shall be present and give their consents thereto.”

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same may be likely to prove injurious to the interests of the company, or shall not be practicable, but when it shall be necessary or advisable to sell upon credit, the board shall, so far as practicable, take or receive in payment, at the least, bills or promissory notes."

"55. That the board of directors shall cause all purchases, for or on behalf of the company, to be made for ready money, so far as the same may be practicable, or they may deem expedient."

A debt due to a wool merchant differs in no respect, so far as the debtor is concerned, from a debt due to a banker; and I see nothing in this deed to prevent the directors from incurring a debt to the bankers of the company, if it were expedient, in their opinion, for the due conduct of the trade, that this should be done. It is also, in my opinion, plain, that these clauses were never meant to be more than directory, that it was never intended that they should be imperative on the directors; that the parties to this deed never meant to contract, that if the directors, in the management of the concern, contracted any debt for the benefit of the company, they must bear it themselves. It is clear, also, that the question of construction cannot depend on the amount of the debt.

As to the second complaint, the clause relative to the signing of cheques appears to me also to be of a similar description, this is directory, but not imperative (a) in this

(a) "59. That the board of directors shall cause every sum ordered to be paid by them, which shall exceed five pounds, to be paid by a cheque or draft on the bankers of the company, to be signed by *three of the directors*, and shall cause every sum, for the payment of which the director or directors specially appointed for

the purpose shall have certified, as aforesaid, to be paid by a draft or drafts on the bankers of the company, to be signed by any one of the directors whom the board of directors shall appoint to sign drafts for the company, except the director or directors who shall have so certified."

this sense, that they are to be disallowed, in passing their accounts, any sums drawn from the bankers by cheques not properly signed, although the money was *bonâ fide* applied for the purposes of the trade.

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The third complaint, viz., failure, during many years, to have the accounts properly audited, appears to me to be affected by the same consideration. This omission also was known, necessarily, to the proprietors, who till 1847 made no complaint, and the absence of this formality cannot be treated as sufficient to make the directors liable for a debt incurred by them, if, in other respects, they ought not to be charged with it.

I am, therefore, of opinion, that so far as money was obtained from the bankers *bonâ fide*, for the use of the trade, and so applied, the proprietors are bound to make good to the directors the amount paid by them in respect of such debt; it appears also to me to be indifferent whether it be called a debt or a loan; in substance it is the same thing, and in my opinion, it is not only not forbidden by the deed, but permitted by it, and by the nature of the trade they had to conduct.

There is undoubtedly a clause to which I have already referred (a) (viz., the 125th), which relates to the indemnity to be afforded to the directors, which excludes from the indemnity the losses and expenses incurred by the company, which have been occasioned by the wilful neglect or default of the directors, and it certainly appeared too, that if it should appear that nothing was done to sanction the proceedings of the directors, it would be very questionable whether they could be allowed more than the money advanced by the bankers, and actually applied in carrying on the trade, together with the simple interest

(a) See *ante*, p. 151.

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interest at five per cent. per annum on such advances. In other words, whether compound interest, with half yearly rests, could be allowed to the directors, and whether this excess of interest ought not properly to be termed losses or expenses occasioned by the wilful neglect of the directors. I am however of opinion that if this course of dealing was brought plainly and clearly before the proprietors, at a public meeting, and that they had sanctioned this course of proceeding, it was a matter in which the majority of the proprietors at a general meeting might properly bind the minority, having regard to the provisions of the deed relative to such meetings, and to the nature of the business which the company carried on. I have come to this conclusion on the principle laid down in *Foss v. Harbottle* (a), by Sir James Wigram, and followed repeatedly, with great approbation, by Lord Cottenham, the clauses in the deed relating to the conduct of the business being, in my opinion, directory only and not imperative.

This introduces me to the last remaining question, which is, the extent of the information communicated to the proprietors at the general meeting, and how far they have sanctioned the proceedings of the directors. Having already occupied so much time in the judgment I have given, I shall not go through, in detail, the voluminous and complicated evidence which has been adduced on this subject. It consists of the accounts of the directors, the reports made by them to the annual meetings, and the proceedings at those meetings, as reported in the local papers. It may be stated generally, that reports were made to the annual meetings and the accounts audited, and a balance sheet, showing the general character of the accounts furnished annually, up to the year 1840, inclusive; that after that time, no accounts

(a) 2 *Hare*, 461.

accounts were audited until the year 1845, when the accounts were audited by one auditor; that in 1847, a committee of investigation was appointed, who recommended the business being brought to a close forthwith. That the directors, acting on the power given to them by the deed, and on the advice of Mr. Ackroyd, an experienced manufacturer, proposed carrying on the business, with a view to dissolution, instead of suddenly closing it; and in *January*, 1850, the order of this Court was made, which compelled it to be wound up and stopped.

Upon the most careful examination I have been able to give to this evidence, I have come to the conclusion, that the reports and the balance sheets submitted to the meetings disclosed to the proprietors, who thought fit to attend these meetings, that the company had incurred a considerable debt; first, to the treasurer, and afterwards to the bankers of the company; and that after the first two or three years, the company was carrying on the business without realizing any profits, and with a continually increasing debt, and that at the meetings, certainly, at least, at one of the most important of them, the chairman offered the fullest information to any one of the proprietors who might think fit to require it; and that with this before them, the proprietors approved of the conduct of the directors, and that the account of this was published in the local papers. I think that this bound the absent proprietors to the extent of the information communicated, and that the circumstance that the reports were not printed, and copies of them were not circulated amongst the proprietors, cannot be insisted on by, or made available for those, who, by reason of absence from the meeting, were ignorant of the proceedings; their ignorance was their own choice, and they who refused or

Absent members of a company held affected by the information furnished by the directors at a general meeting, and bound by the proceedings, as to matters within its competence.
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neglected to attend, cannot plead the same advantage of their ignorance as they might have done, if no meetings had been held and no reports made. They are, in my opinion, bound to the full extent to which it was competent to a general meeting to bind them, that is, to the full extent to which the proprietors, at the annual general meeting, intended to sanction and approve the conduct of the directors, in the management of the concern. To determine to what extent this proceeds, requires further investigation. I think that the proprietors who attended are not bound by the information contained in the books of account which they might have inspected if they had thought proper, but that they are bound by the statements in the reports and in the accounts accompanying them, and which accounts were read to the meeting. These accounts show, as I have already stated, the absence of profits and the increasing debt, but they do not disclose the fact, that the debt to the bankers was running up at compound interest, with half-yearly rests. This fact seems to me never to have been disclosed to the meeting, and therefore never to have been sanctioned by the proprietors. I understand that this is not claimed by the directors; if it were, I should be of opinion that the burthen of proof to shew that this was necessary for the conduct of the trade lay on the directors, and that they had failed to shew this, and that in the absence of any such proof, it must be taken to have been an improper course of dealing, neither authorized by the deed, nor by the implied contract as to the mode of conducting such a business. As, however, this is not claimed, it is unnecessary to pursue the subject any further.

I treat this debt exactly as so much money advanced or paid by the directors, which they seek to have repaid to them, on the ground that it was spent *bonâ fide*, for the

the benefit of the company, and on this, and following the decision of the Lords Justices, in the *German Mining Company*, I am of opinion that they must be allowed simple interest, at five per cent. on their advances.

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With regard to the proceedings of the directors, since the formation of the committee of investigation and their report, I cannot, in my opinion, properly charge the directors with the losses occasioned by the subsequent continuance of the trade. The evidence satisfies me, that they acted for the best and in the manner they believed to be likely to be the least injurious to the company. The company, no doubt, sustained a great loss, but I have no means of judging that the loss would not have been still more severe, if the business had been suddenly closed and the assets then realized, and the property sold, as, in the opinion of Mr. Ackroyd, on whose advice they acted, would have been the probable result.

I am therefore of opinion, that they are entitled to be allowed all sums advanced by them, or which is the same thing, borrowed by them for this purpose, with simple interest, at five per cent. per annum, but not compound interest, or annual or half-yearly rests, and in this allowance of interest, I follow the decision of the Lords Justices in the case of the *German Mining Company*, *Ex parte Chippendale* (a).

According to my decision, the directors are entitled to be allowed, in account, all sums of money advanced by them, or for which they have made themselves

(a) 4 *De G., M. & Gor.* 19.

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selves liable, for the purpose of carrying on the business of the company, from the formation thereof till the winding up thereof, together with simple interest thereon, at five per cent. per annum, and they are entitled to be repaid that amount, as far as the sum in Court will extend after payment of the costs, and the surplus must be raised by a call from the proprietors, in proportion to the number of shares held by them respectively, and the costs of this proceeding must be borne by the estate of the company.

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April 11, 12.

A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son *William* until he attained twenty-one, "and when and so soon as" he should attain twenty-one, the testatrix devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, or if none, then to the Defendants. The son did attain twenty-one, and died without issue in the

THE testatrix, *Mary Parker*, by her will, dated in 1834, devised and bequeathed all her real and personal estate unto the Plaintiff *Cox* and *Henry Jump*, deceased, and their heirs, &c., upon trust to convert her estate (except her freehold and leasehold premises), and with the money to pay off a mortgage on her freehold premises in *Leeds Street*, "and upon further trust to receive the rent of all her freehold and leasehold premises, and after defraying thereout all disbursements necessary for interests on the said mortgage, and keeping the said premises in good repair and insured from fire, to lay out the surplus thereof, or, so much thereof as they, in their discretion, should see fit, in the maintenance, education and advancement in life of her only child, *William Michael Parker*, until he should attain the age of twenty-one years," and to accumulate the surplus for her said child, or to wholly pay off the said mortgage as occasion might require. "And when, and so soon

lifetime of the testatrix. There being no heir or next of kin of the testatrix, Held, that the trustee was entitled to hold the real estate beneficially.

soon as her said son should attain the said age of twenty-one years, she gave, devised and bequeathed to him, and to his heirs, &c. her freeholds in *Leeds Street*, her leaseholds in *Banaster Street*, and the accumulation (if any) and all other her said residuary trust estate ; but in case her said son should happen to die before attaining the age of twenty-one years, leaving lawful issue him surviving, then she gave all the said trust estate, hereditaments and premises unto his children. But in case he should die before he attained the age of twenty-one years, and without leaving lawful issue him surviving, or leaving such and all such issue should die under the said age of twenty-one years, or unmarried," then she directed her trustees to sell the trust estate, and out of the proceeds pay certain legacies, and, subject to the payment thereof, she gave and bequeathed the whole remainder of her residuary trust estate unto the children of *Benjamin Parker* and of *Mary Ellis*, who should be then living. The testatrix appointed the Plaintiff and *Jump* executors of the said will.

William Michael Parker died in 1847, without ever having been married. The testatrix died in *February, 1848*, both her son, *William Michael Parker* and her trustee, *Jump*, having predeceased her. There were children of *Benjamin Parker* and *Mary Ellis*, who were Defendants to this bill.

The mortgagees, under a power of sale, sold the mortgaged premises, and, after retaining what was due to them, paid the surplus into Court under the Trustee Relief Act.

No next of kin or heir at law of the testatrix could be found, and under these circumstances, the Plaintiff, the

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the surviving trustee, claimed the produce of the real estate beneficially.

Mr. Field, for the Plaintiff. The gift to the son altogether failed by his death, without issue, in the lifetime of the testatrix. As to the legacies and the gift over, they were to take effect only in case the son "died under twenty-one, without leaving lawful issue," that event has not happened, and, in the absence of any heir, the trustee is entitled to retain the real estate for his own benefit to the exclusion of the Crown; *Burgess v. Wheate* (*a*).

Mr. R. Palmer, for the children of *Benjamin Parker* and *Mary Ellis*. The testatrix clearly intended, that the gift to the children of *Benjamin Parker* and *Mary Ellis* should take effect whenever the previous gift failed, and the devise in favour of her son being removed, the ultimate gift to these legatees takes effect. He referred to the cases cited in *2 Jarman* on Wills (*b*). The gift to the son would have vested in the son immediately on the death of his mother; *Boraston's case* (*c*); and would have become indefeasible on his attaining twenty-one, and the only event which the testatrix contemplated would defeat the legatees was the decease of her son under twenty-one, and she naturally assumed that he would survive her.

Mr. Wickens, for the Crown. The gift to the trustees fails altogether, for there are no objects, and no trust to perform from the beginning. The estate of the trustees will be cut down to what is necessary for the performance of their functions. It is said in *2 Jarman* on Wills

(*a*) 1 *Wm. Blackstone*, 123, and
1 *Eden*, 177.

(*b*) Page 702, (1st ed.), and
p. 667, (2nd ed.).
(*c*) 3 Rep. 19 *a*.

Wills (*a*), "But the Courts are strongly inclined to give the devise such a construction, as will confer on the trustees estates co-extensive with those interests which are limited in the terms of trust estates, if the other parts of the will can, by any means, be made consistent." *Doe d. Budden v. Harris* (*b*).

Mr. Field, in reply.

The MASTER of the ROLLS.

I will give judgment to-morrow.

The MASTER of the ROLLS.

April 12.

The question is, whether the devise took effect at all, for if it did, the trustees must take the legal estate. Having taken the legal estate, there are no trusts to perform, and they are, therefore, entitled to hold the property.

It is different from the case where the heir would have taken the legal estate, by reason of the estate of the trustees having determined with the determination of the trusts, in which case, the rights of the Crown would have taken effect.

I should have had no doubt, if the son had happened to survive the testatrix, and attained twenty-one, and had then died without leaving issue. I should in that case have held, that on his attaining the age of twenty-one the estate of the trustees ceased, that the legal fee then vested in the son, and that on his death without heirs, the right of the Crown attached.

Assuming

(*a*) Page 199, 1st ed., and p. 240, 2nd ed. (*b*) 2 *Dowl. & Ryl.* 36.

1856.
 Cox
 v.
 PARKER.

Assuming that there was an heir of testatrix now in existence, I should hold that the estate was in the trustees, but was held by them in trust for the heir.

I am of opinion that the Plaintiff is entitled to the remaining produce of the real estate.

MOORE v. PETCHELL.

May 23.

A promissory note, dated the 4th of October, 1842, was payable "at six months' notice." An action was brought on it in October, 1848, and the indorsement on the writ stated, that on payment within four days, proceedings would be stayed. The action was abandoned, and a formal notice to pay in six months was given in January, 1850. The testator died in December, 1850, having devised his real and personal estate to his executors, in trust

IN 1842, the testator, *Thomas Petchell* (represented by the Defendant), gave to *Toynbee* (represented by the Plaintiff), a promissory note in the following form :—

"At six months' notice, I promise to pay to Mr. *John Toynbee*, or order, the sum of 400*l.* with interest, at the rate of 3*l.* 10*s.* per centum per annum, for value received, this 4th day of *October*, 1842."

Toynbee died in 1843, and on the 5th of *October*, 1848, the Plaintiff, his executor, served *Petchell* with a writ of summons. The writ was indorsed, in the usual form, as follows :—

"The Plaintiff claims 490*l.* for debt, and 3*l.* 3*s.* for cost. And if the amount thereof be paid to the Plaintiff, or his attorneys, within four days from the service hereof, further proceedings will be stayed."

The

to sell, and in the first place pay his debts. A creditor's suit was instituted by the payee in 1855, to which the administrators pleaded the Statute of Limitations. The Court held, that the trust for payment of the debts prevented the operation of the statute, both as to the real and personal estate, and that neither the action nor the indorsement on the writ were sufficient notice to pay, according to the tenor of the note.

The action was abandoned, and the Plaintiff, on the 15th of January, 1850, served *Petchell* with notice to pay the note at the expiration of six months. The six months expired on the 15th of July, 1850, and in October, 1850, the Plaintiff brought a second action to recover the amount.

Petchell died in December, 1850, having by his will devised and bequeathed to his executors all his real and personal estate, in trust to sell, and out of the produce, in the first place, to pay the mortgages, and "all other his just debts, personal and testamentary expenses."

Six years from the notice of 1850 expired in 1856, but before that time, and in 1855, the Plaintiff filed this bill on behalf, &c. for the administration of the real and personal estate of *Petchell*. No interest appeared to have been ever paid.

The Defendants pleaded the Statute of Limitations, and the Plaintiff replied to the plea.

Mr. *Selwyn* and Mr. *Roxburgh*, for the Plaintiff, argued, first, that the statute did not run until demand, which was first made by the notice given in January, 1850; that bringing an action could not be considered a notice to pay at six months, nor could the indorsement on the writ to pay within four days. They cited *Holmes v. Kerrison* (a); *Thorpe v. Booth* (b); *Clayton v. Gosling* (c); *Christie v. Fonswick* (d); and see *Norton v. Ellam* (e). Secondly, that the trust contained in the will prevented the statute applying.

Mr. *Knight*, contra. The Plaintiff's remedy is barred by

(a) 2 *Taunt.* 323.

(d) 1 *Selw. N. Prior*, 352.

(b) *Ry. & Mood.* 388.

(e) 2 *Mee. & W.* 461.

(c) 5 *Barn. & Cr.* 360.

1856.

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MOORE
v.
PETCHELL.

1856.

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 Moore  
v.  
Patchell.

by the Statute of Limitations, for the action in 1848 was a notice to the maker that the payee required payment. Besides, the indorsement on the writ was a specific demand of payment of the debt, and the service of the writ was itself equivalent to notice, it plainly shewing that the Plaintiff required payment. He cited *Rumball v. Ball* (*a*); *Frampton v. Coulson* (*b*); *Waters v. Earl Thanet* (*c*); *Baillie v. Edwards* (*d*).

*The Master of the Rolls.*

It appears to me that the objection as to the Statute of Limitations cannot prevail, because the fact of the testator having directed all his property to be held in trust for payment of all his just debts prevents the statute running after his death, and makes all his creditors, as it were, *cestuis que trust*, and entitles them to be paid out of his property. I am therefore of opinion, that the objection as to the Statute of Limitations cannot stand.

Upon the other point, I think the commencing the action did not amount to notice, which was to be "six months' notice." The indorsement on the writ of summons required payment in four days, and I think it would be difficult to say, that that was the notice contemplated, for payment was promised "at six months' notice," but the indorsement required payment in four days. In point of fact, notice can only be said to run from the 15th of January, 1850, when payment was required in six months.

I think I must make the usual decree for taking the accounts

(*a*) 10 Mod. 33.

(*b*) 1 Sargent Wilson's Rep. 33.

(*c*) 2 Q. B. Rep. 737.

(*d*) 2 H. Ld. Ca. 74.

accounts both of the real and personal estate of *Thomas Petchell* deceased. The amount of the debt will be afterwards ascertained in Chambers.

**NOTE.**—See *Crallan v. Oulton*, 3 *Beav.* 1; *Hughes v. Wynne, Thurn. & R.* 307; *Jones v. Scott*, 1 *Russ. & M.* 255; reversed, 4 *C. & Fin.* 382.

1866.

Moore

v.

PETCHELL.

## ST. AUBYN v. HUMPHREYS.

**T**HE testatrix gave her residue to trustees for *Edmund St. Aubyn* for life, with remainder to his children.

She died in 1849, and a suit having been instituted for the administration of her estate, by an order on further directions, made in February, 1855, a sum of 101*l.* 19*s.* (being income of the residue) was ordered to be paid to *Edmund St. Aubyn*. He however died in April, 1855, without having received it.

A petition was presented by his children and widow for payment to the latter of the trust fund. The petition stated, that by an indenture, made the 8th of September, 1853, between *Edmund St. Aubyn* of the one part, and two trustees of the other, he assigned to the trustees "all and singular the household goods, furniture, plate, linen, china, and also all other the chattels, personal estate and effects, whatsoever and wheresoever, of what nature, kind or quality soever, of him the said *Edmund St. Aubyn*, and whether then in possession or to which he could or might thereafter lay claim or title to be possessed of, or interested in, in any manner howsoever," to hold upon such trusts as he should by deed or will appoint, and in default, for himself for life, and after his decease, for his wife absolutely, with a gift over to her next of kin, in the event of her dying in the lifetime of her husband.

April 17, 26.

Settlement by husband of all his personal estate to which he was then, or might thereafter become, entitled, in trust for himself for life, with remainder absolutely to his wife. Held, not to comprise his interest in a fund bequeathed to him for life, with remainder to his children.

Mr.

1856.

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St. AUBYN
v.
HUMPHREYS.

Mr. *Rouppell* and Mr. *Druce*, in support of the petition, asked that the 101*l.* 19*s.*, and the dividends thereon, might be paid over to the widow.

The Master of the Rolls was disposed to make the order, but

Mr. *Bagshawe* stated that in *White v. Briggs*, Lord *Cottenham* had held, that a life interest of a husband was not liable to be settled under his covenant to settle all his estate. He afterwards furnished a note of that case.

1848.
July 15.
Before
*The Lord
Chancellor.*

A covenant by a husband to settle all future-acquired property on himself, his wife and children, does not include his life interest in property bequeathed to him with a direction to settle it on himself and his family.

BY his marriage settlement, made in 1831, *Charles Herbert White*, reciting that he had no property in possession, but had great expectations, covenanted to settle one moiety of the property he should acquire during the coverture, for the benefit of himself and his intended wife successively for life, and afterwards for their children.

Many years after the marriage, his uncle, by his will, left a large property to *Charles Herbert White*, but directed that it should be secured by his executors for the benefit of himself and "his family."

The suit of *White v. Briggs* was instituted for administering the uncle's estate, and for having a settlement made in accordance with trusts of the uncle's will.

The trustees and wife and children of *Charles Herbert White* were made parties to the suit, on the ground that the actual settlement made on the marriage should be adopted as the settlement to be made under the will, and the trustees of the settlement claimed, at all events, to have, by virtue of the covenants in the marriage settlements, all such property as *Charles Herbert White* should acquire under the will, and under the settlement directed by the will.

The settlement directed by the will gave nothing more to *Charles Herbert White* than a life estate and an ultimate reversion in case of the death of all his (six) children under twenty-one.

This life estate was claimed by the trustees of the original settlement.

After great litigation (a), Lord *Cottenham* (by Order, of the 15th of July, 1848), declared. "that the interest which *Charles Herbert White* took under the will, was not subject to the covenant contained in his marriage settlement (b)."

(a) See 15 *Sir. 17*; 2 *Philips.* 555. (b) See *Reg. Lib. R.* 1847, fol. 534.

The Master of the Rolls.

Upon consideration of the case of *Lewis v. Madocks* (a), and of *White v. Briggs*, mentioned to me by Mr. Bagshawe, I am of opinion that I must hold, that the 101*l.* 19*s.* due to *Edmund St. Aubyn* for arrears of his life interest at his death, did not pass by the deed of the 8th of September, 1853.

(a) 8 *Ves.* 149; 17 *Ves.* 48.

1856.

ST. AUBYN
v.
HUMPHREYS.

April 28.

In re RANCE.

IN 1852, *Andrews* the younger borrowed some money on mortgage, for the payment of which his father, *Andrews* the elder, became surety.

The mortgagee, through *Rance* his solicitor, pressed for payment, and took legal proceedings against *Andrews* the younger.

On the 28th of September, 1855, Mr. *Button*, the solicitor to the Messrs. *Andrews*, applied to Mr. *Rance* for an account of principal, interest and costs due, which he furnished on the 24th of October, his bill of costs up to this time, on which nothing turned, being 27*l.* 3*s.* 4*d.* On the 5th of November Mr. *Button* informed Mr. *Rance* that *Andrews* the elder had agreed to purchase the mortgaged property from *Andrews* the younger, and requested to be furnished "with a short abstract of title to enable him to prepare the convey-

March 17, 19.
Taxation ordered of a paid bill of a mortgagee's solicitor in a mixed case of pressure and of improper items.

The mortgagee took legal proceedings against the mortgagor, whereby expenses were being incurred. The mortgagee's solicitor delivered his bill on the 25th of December, and the parties met to complete a transfer on the 29th of December. The bill contained a

charge for an abstract, which was more than double what it ought to have been, but the solicitor refused to reduce it, and the bill was paid. It did not appear that any proposal had been made to settle the matter, and postpone the question of costs. The Court, considering that there had been both pressure and overcharge, ordered a taxation.

1856.
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*In re RANCE.* ance." The abstract was furnished on the 14th of November, and on the 18th of December the draft conveyance was sent to Mr. *Rance*, and returned by him approved. On the same day, *Andrews* the elder was served with a writ for the mortgage money.

*Rance* urged that the matter should be settled on the 28th or 29th of December, and on the 25th he delivered a second bill of costs, 29*l.* 18*s.* 4*d.* The parties went over from Newmarket to Cambridge, on the 29th of December, to complete, when the bill was objected to, but *Rance* refusing to abate any thing, it was paid by Mr. *Button* under protest.

The fact really was, that *Andrews* the elder had arranged for raising a sum of 1,100*l.* on mortgage of the property, which it was necessary to complete before the 1st of January, but this fact did not appear to have been known to *Rance*.

A petition was presented in February for the taxation of both bills. The item principally objected to was a charge for the abstract of forty-three brief sheets, which contained only 169 folios, or about four folios per sheet instead of eight. Besides this, on a former sale of a small portion of the mortgaged property, *Rance* had made an abstract of the same title, for which the mortgagor had paid, and it was contended, that this ought to have been copied into the second abstract, instead of making a new one of greater length.

The affidavit in support of the petition did not state that any proposal had been made to *Rance* to complete and hand over the deeds without payment of his bill of costs; but *Rance* stated "that he never objected to part with the title deeds and writings held by his client until his bills

bills had been paid, nor did he ever use any pressure, or in any way stipulate or make it a condition, that such bills should be paid previously to such title deeds and writings being delivered up."

1856.  
In re RANCE.

**Mr. Selwyn**, in support of the petition.

**Mr. R. Palmer** and Mr. Giffard, contra.

*Re Browne (a); Re Wells (b); Re Barrow (c); Re Finch (d); In re Currie (e); In re Fyson (f); In re Jones (g); Ex parte Wilkinson (h); Ex parte Barton (i); Re Catlin (k)* were cited.

*The Master of the Rolls* reserved judgment.

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*The Master of the Rolls.*

March 19.

This is a mixed case of pressure and of improper items. The property belonged to Andrews the younger, who mortgaged it for 600*l.* to Watson, and the mortgage money was secured by a bond executed by the father of Andrews as a collateral security. One bill of costs had been delivered in October, and relative to this, nothing occurs that would have induced me to order it to be taxed, if it had stood alone. An application for payment was made by Watson, and the time for payment was fixed for the 29th of December, 1855. In the mean time, two actions were brought, an ejectment against the son and an action against the father, and the writ was served on the 18th of December, and all this occasioned

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| (a) 15 Beav. 61.  | (f) 9 Beav. 117.            |
| (b) 8 Beav. 416.  | (g) 8 Beav. 479.            |
| (c) 17 Beav. 547. | (h) 2 Coll. 92.             |
| (d) 16 Beav. 585. | (i) 4 De G., M. & Gor. 108. |
| (e) 9 Beav. 602.  | (k) 18 Beav. 508.           |

1856.

*In re RANCE.*

sioned great expenses. Although it was the fact that the father was borrowing money to enable him to pay off the mortgage, yet this was not known to Mr. *Rance* the solicitor. In this state of things, the second bill is sent on 24th *December*, 1855, which was received on Christmas-day, and it contains improper items. Now if *Rance* had known that *Andrews* the elder was obtaining money from a mortgagee, who would not advance it without the deeds, and had said "I will not part with the deeds without payment of my bills," I should have been of opinion, that it was pressure, and ordered taxation, but he did not know it. *Button* does not say that he asked for the deeds without payment, and *Rance* does not say that without payment he would have delivered them. This is left to inference. There was, however, pressure to some extent, for *Rance* knew of the actions, he knew that expenses were running on, and that the time for payment had been fixed for that day, and that it would occasion great expense to postpone it.

I turn to the bill of costs, and I find a charge for an abstract of forty-three sheets. I then turn to the abstract itself and I find it contains only 169 folios, and I learn from the Taxing Master, that it ought to contain eight folios per sheet, so that the abstract was twenty-one sheets and one folio, but is charged more than double. This is an unfair abstract and an unfair item, and taking the matter altogether, I shall tax this bill, but I shall give *Rance* the option of including or excluding the other bill, and he must pay the costs of the petition.

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1856.

HUGHES *v.* EMPSON.*March 8, 18.*

**T**HE testator gave his residue to his two executors, upon trust, after converting the same into money, to lay out and invest the same in or upon Government or real securities, or upon railway bonds or debentures in England, and hold the same on trust for the Plaintiff.

The testator died the 20th of *September*, 1853. Part of his estate consisted of seventy-five original *Crystal Palace* shares, which the executors retained.

By the decree, an inquiry was directed, under what circumstances the Defendant had retained the shares, and whether any and what loss had been occasioned thereby.

The Chief Clerk, by his certificate, found the average price of the shares between the 21st of *October*, 1853 (when the will of the testator was proved by the Defendant), and the 22nd of *December*, 1853 (being two months after), and deducting therefrom the price of the shares on the 14th of *November*, 1855 (the date of his certificate), he found that there had been a loss of 32*5l.*, with which he charged the executor.

The executor objected to the finding, and his objections now came on for argument.

Mr. *R. Palmer* and Mr. *Selwyn*, for the executor, contended, that the executor ought not to have been charged with the price of the shares at the end of two months,

Where executors have neglected to realize assets, which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it.

Losses occurred by the non-sale of *Crystal Palace* shares, which were at a premium at the testator's death, but subsequently fell to a discount. The executors were charged by the certificate with the value at the end of two months, but the Court varied the certificate to twelve months.

1856.

HUGHES  
v.  
EMERSON.

months, but at the end of twelve months, when their value had considerably diminished, and that no rule existed which required the conversion at the end of two months.

Mr. *Lloyd* and Mr. *W. W. Cooper*, for the Plaintiff, argued, that some period must be fixed for calculating the loss, which had occurred by the executor allowing the assets to remain on an unauthorized security, and that two months was a reasonable time within which the executor ought to have converted the *Crystal Palace* shares.

*Buxton v. Buxton* (a); *Bate v. Hooper* (b); *Morgan v. Morgan* (c); *Knott v. Cottee* (d), were cited.

The MASTER of the ROLLS, though he now seemed to think that the certificate was correct, mentioned the case on a subsequent day.

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March 18.

*The MASTER of the ROLLS.*

I was desirous to reconsider what I had done in this case on a motion to vary the certificate, and though I concur in the general effect of it, yet I think I was too hasty on the subject at the time, and I propose to vary it. The question is this:—The executors found a portion of the testator's property invested in *Crystal Palace* shares. It was clearly their duty to sell and invest the produce, and not having done so, they are liable for the loss which has occurred by their omission, and that is what

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| (a) 1 <i>Myl. &amp; Cr.</i> 80.        | (c) 11 <i>Barr.</i> 72. |
| (b) 5 <i>De G., M. &amp; Gor.</i> 338. | (d) 16 <i>Barr.</i> 77. |

**what I intended to determine on the former occasion. But then the question is, at what time is the loss to be ascertained?** because the price varied very considerably between the death and the sale. I said that two months was a reasonable time for that purpose, but it was contended that a year was the time which has always been given, and that such was the period allowed in *Bate v. Hooper* (a); but that case does not govern me on this occasion; there must necessarily be a discretion, and I concur with the argument of Mr. *Lloyd*, that there is no fixed period, and that it is impossible to say that it is one year. You cannot fix one period for selling every species of property. Thus suppose the testator possessed a large quantity of horses, it would be culpable to keep them, at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. But with respect to other property, there must be a reasonable time allowed for selling it.

With respect to these shares this was their situation : —The institution had not opened, and they paid no dividend, but they bore a premium in the market, and in the view I take of the case, I should have considered it prudent to sell at the earliest period ; but in all these cases, a large discretion is allowed to the executors. In *Buxton v. Buxton* (b), Lord *Cottenham* held, that where an executor had not sold *Mexican* bonds until a year and a half after the death, and had *bona fide* kept them, he ought not to be charged with the loss. In this state of things, I consider that the executor may properly exercise a reasonable discretion, and I cannot fix any particular period. I think, in my own view, that two months would have been reasonable time, but he might fairly have considered twelve months. I shall, therefore, only charge him

(a) 5 *De G., M. & Gor.* 338.

(b) 1 *Myl. & Cr.* 80.

1856.

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Hughes
v.
Emerson.

1856.
 HUGHES
 v.
 EMPSON.

him with the loss which would have occurred if he had sold them at the end of twelve months. I have considered whether I could lay down any general rule, but find it impossible. The question depends on the particular nature of the property and the evidence affecting it. I shall, therefore, alter the certificate and charge the executor with the value of the shares at the end of twelve months.

April 29.
 May 3.

In 1842, the testator executed a voluntary bond, payable after his death, and, in 1850, he made a voluntary settlement in favour of other parties. His assets proved insufficient to pay the bond. Held, that there was not sufficient ground for holding that the deed was fraudulent as against the bond creditors, and that the *onus* of proving the deed to be

fraudulent attached to the obligees of the bond.

By a voluntary settlement, the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds. Held, that this Court would not render its assistance to compel the voluntary settlement to be perfected.

It has long been settled, that the trustees and *cestuis que trust* under a voluntary settlement cannot compel the settlor to perform any further act, than he has already done, to render such a settlement operative.

DENING v. WARE.

ON the 1st of August, 1842, *Edward Deacon* executed a voluntary bond to *Samuel Ware*, in the penal sum of 2,000*l.*, whereby, after reciting that, in token of affection for his wife, *Ann Deacon*, he had consented that she might make her will, and thereby dispose of 1,000*l.* to such persons as she might think proper, it was conditioned that, if he *Edward Deacon* should permit her to make her will, and thereby bequeath 1,000*l.*, and if within six months after the decease of *Edward Deacon*, his heirs, executors, administrators, or assigns, should pay the 1,000*l.*, in such manner as his said wife should have appointed, then the bond should be void.

Ann Deacon accordingly, by her will, dated the 24th September, 1842, bequeathed sundry legacies, payable

six

fraudulent attached to the obligees of the bond.

By a voluntary settlement, the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds. Held, that this Court would not render its assistance to compel the voluntary settlement to be perfected.

It has long been settled, that the trustees and *cestuis que trust* under a voluntary settlement cannot compel the settlor to perform any further act, than he has already done, to render such a settlement operative.

six months after her husband's death, under his bond, and she died on the 22nd *September*, 1849.

Edward Deacon, by his will, dated 20th *October*, 1849, gave all his property to the Plaintiff, upon trust to convert and discharge the bond, and apply the residue as therein mentioned.

By an indenture, dated the 22nd of *June*, 1850, and made between *Edward Deacon* of the first part, *George Hopewell* of the second part, and two trustees of the third part, reciting a mortgage to *Edward Deacon* of certain copyhold hereditaments of the manor of *Chard*, in *Somerset* to secure the sum of 670*l.* and interest, and reciting a copy of court roll of the same manor, dated the 1st of *December*, 1830, whereby certain hereditaments were granted to *Edward Deacon* for the lives of himself and four other persons, and the life of the survivor; and also reciting that he *Edward Deacon* was desirous of making a settlement of the 670*l.* and interest, and of the said hereditaments so granted or belonging to him as aforesaid, in favour of *George Hopewell*, for the benefit of himself, his wife, and family, subject to the life interest of him, *Edward Deacon*, therein, it was witnessed, that in consideration of natural love and affection, he, the said *Edward Deacon*, assigned to the two trustees the said sum of 670*l.*, and all interest due and to grow due for the same, upon the trusts thereafter mentioned, and he thereby also released to the same persons, the mortgaged premises and the hereditaments granted to him for lives upon the same trusts. These were for *Edward Deacon* for life, and after his decease for *George Hopewell*, his heirs, &c. absolutely. Then followed covenants by *Edward Deacon*, for power to convey the hereditaments, for quiet enjoyments by *Dening* and *Gore*, and for further assurance.

Edward

1856.

DENING

v.
WAR.

1856.

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DENING  
v.  
WARE.

*Edward Deacon* died in *August, 1852.*

The copyholds had never been surrendered to the uses of the settlements, and the deeds relating to the present mortgage security and debt comprised in the indenture of settlement of *June, 1850*, remained in the hands of *Edward Deacon* until his death, when they were taken possession of by *George Hopewell*. He contended, that the settlement of *June, 1850*, was valid, as against the bond of 1842, and that the property thereby assigned and conveyed formed no part of the testator's assets, and was not liable or subject to the claims of the several persons interested under the bond and the will of *Ann Deacon*.

The present suit was instituted in order to obtain a declaration as to the rights of the parties and for the administration of the testator's estate; at the hearing, a decree was made directing inquiries and accounts.

The Chief Clerk certified, that at the death of *Edward Deacon* he had no personal estate, except some wearing apparel of trifling value; that the real estate belonging to him at his death (other than the hereditaments comprised in the settlement of *June, 1850*) consisted of five cottages and gardens thereto; two cottages (burnt down) and gardens thereto, and a small freehold field adjoining, and which cottages and field had, in pursuance of the decree, been sold for 490*l.*; that there was a balance of 108*l. 9s. 7d.*, due from the Plaintiffs, in respect of rents, &c. received by them; and that the simple contract debts amounted to 29*l. 18s. 6d.*, and the legacies bequeathed by *Deacon* to 240*l. 11s. 10d.*

The assets (other than those comprised in the settlement) being insufficient to discharge the simple contract debts and the bond debt, the questions, on the cause coming

coming on for further consideration, were, first, whether the settlement was fraudulent and void as against creditors, and if not, then secondly, whether the property comprised in it was thereby effectually conveyed, or remained part of the assets of the testator.

With reference to the first point, it was stated in the bill, that on the 1st of *August*, 1842, the whole property of the testator was estimated at about 2,000*l.*, the seven cottages and freehold field, which were sold under the decree for 490*l.*, being then supposed to be worth 1,000*l.*

**Mr. R. Palmer** and **Mr. W. W. Cooper**, for the Plaintiffs.

**Mr. Follett** and **Mr. Freeman**, for the legatee of *Ann Deacon*. The bond is an ordinary bond, under the hand and seal of the testator, on which an action at law might be maintained; it may therefore be enforced in this Court; *Fletcher v. Fletcher* (a). The deed of settlement would not, at law, be any defence to such an action on the bond, for it rendered the testator insolvent, and was therefore void under the statute 13 Eliz. c. 5, as being made with the view and intent of defrauding creditors. It cannot therefore stand as against the bond, in this Court. The bond, though voluntary, is good at law, but in this Court, no doubt, voluntary debts rank after debts for value; that is the only difference.

Even if the deed of settlement should be held to be valid, and not made in fraud of creditors, it nevertheless fails to constitute an effectual conveyance of the property comprised in it, by reason of the copyholds not having been surrendered to the uses of the settlement,  
and

(a) 4 *Hare*, 67.

1856.

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DENING
v.
WARE.

1856.

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 Denning  
v.  
Ware.

and the deed being voluntary, this Court will not interfere to complete the conveyance. The copyholds, therefore, are not subject to the trusts limited by the settlement. They cited *Jenkins v. Briant* (*a*); *Watson v. Parker* (*b*).

Mr. *Hanson* in the same interest, contended that the settlement was incomplete, and, being voluntary, was, therefore, not binding.

Mr. *Fischer* for *G. Hopewell* and wife.

Mr. *Brooksbank* for *Samuel Ware*.

*The Master of the Rolls* expressed his opinion to be, that the bond constituted a perfectly good debt from the testator, and made his assets liable for that amount. He, however, reserved judgment on the principal points.

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May 3.

*The Master of the Rolls.*

It is quite clear, that the bond of *August, 1842*, is a good bond, and that the amount thereby secured must be paid out of the assets of the testator. The question is, whether the property conveyed by the deed of 1850 did, or did not, form part of his assets at his death. This, so far as that indenture is complete, and does not rest *in fieri*, depends upon whether the deed is void under the 13 Eliz. c. 5, as being made with the view and intent to defraud creditors. It was argued, that this must be the intent of this deed, inasmuch as their debt

(*a*) 6 *Simp.* 603.

(*b*) 6 *Beav.* 283.

**debt** on the assets of the testator would be thereby **defeated**. But I am of opinion that no facts exist in **this** case, on which such a conclusion can be properly **rested**. It is true that the sale of the property of the **testator** has produced less than might have been **expected**, and that thereby a deficiency has been created; **but** no other facts appear, by which it can be reasonably **inferred**, that the testator knew, or believed, or had just **reason** to believe, that his assets, after this property had **been** deducted, would not have been sufficient to pay **the** bond in addition to debts contracted for value. In a **case** of this description, between volunteers on both **sides**, the burthen of proving that the deed was **executed** with a view to defraud creditors, in my opinion, **falls** on the person claiming under the bond, and, as I **have** stated, I find not only no facts leading me to that **conclusion**, but what evidence there is, induces me to **come** to an opposite opinion. I am of opinion, therefore, that the deed of 1850 is a valid deed, and that all **the** property thereby effectually conveyed ceased to **form** a part of the assets of the testator.

**T**he next question is, whether the Court will assist **the** person claiming under the settlement of 1850, for **the** purpose of completing that which the testator left **incomplete**, but covenanted to complete; I am of **opinion** that this cannot be done, and that so far as **anything** further remains to be done to complete the **title** of the trustees under that deed, and which they **can** not now accomplish without the aid of this Court, **to** that extent, they cannot hold the property covenanted **to** be conveyed or surrendered against the persons **claiming** under the bond or the will of the testatrix. The question against them is the same that it would **have** been against the testator himself, if he were now **alive**, and this were a suit to compel him to surrender the **copyholds**;

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DENING
v.
WARE.

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DENING  
v.  
WARE.

copyholds ; and it has long been settled, that the trustees and *cestuis que trust*, under a voluntary settlement, cannot compel the settlor to perform any further act than he has already done to render that settlement operative. Declare accordingly.

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*April 7, 8,  
and 26.*

The "full discharge (of a prisoner) from custody without any adjudication" by the Court, under the provisions of the 37th sect. of 1 & 2 Vict. c. 110, means a discharge from prison in a complete and unconditional form. The word "full," as applied to the word "discharge," is explained by the 38th section, which shews that the insolvent may obtain a discharge from prison on bail, or upon conditions not amounting to a full discharge.

Therefore, where a vesting order was made, and before any final order of adjudication or any further step taken, the insolvent was discharged by the detaining creditor, and no revesting order was ever made, it was held, that the discharge was a "full discharge" under the 37th section, and that after-acquired property did not pass to the provisional assignee under that insolvency.

Observation as to the danger of allowing a party to mend his case, upon a reference back to Chambers, after it has been brought before the Court, and the exact point in which the evidence is thought to be defective is known.

#### BASHAM v. SMITH.

IN 1843, *Montague George Smith*, applied by petition, in the usual way, for the benefit of the Insolvent Debtors' Act, and the usual vesting order was made on the 4th of November, 1843. Afterwards, the detaining creditor discharged him from custody ; nothing further took place in that insolvency, no schedule was filed, and no revesting order made.

In 1845, *Smith* became a second time insolvent, and the usual vesting order was made ; and on the 29th of October, 1845, the *final order of adjudication* was made, and he was thereupon discharged from prison, and his estate was vested in Mr. *Sturgis*.

In March, 1848, *Smith*, under an agreement with *Broughton*, became entitled to a charge on a reversionary interest, which now amounted to 175*l.*

In

**In** 1852, *Smith* a third time took the benefit of the Insolvent Debtors' Act, and an order was made **vesting** his estate and effects in the Defendant *Sturgis*.

**I**t was alleged, that under these orders the 175*l.* was **vested** in *Sturgis*. On the other hand, the 175*l.* was **claimed** by *W. Smith*, father of *Montague George Smith*, under an alleged agreement of the 18th of *March*, 1848.

**T**he Chief Clerk certified, that 175*l.* 13*s.* 4*d.* was due **upon** the security to *Sturgis*, and nothing to *Smith's father*, on the grounds that "the insolvency of 1843 prevailed, and vested the property in the Defendant *Sturgis*; and that *W. Smith's* security being taken subsequently, could not avail against the title of *Sturgis*." He also certified, that "there was no sufficient proof of notice to the Plaintiff by *W. Smith* of his security, so as to affect the title of *Sturgis*."

**T**he cause now came before the Court upon motion to **vary** the certificate, whereupon two questions arose: first, upon the construction of the stat. 1 & 2 Vict. c. 110; and second, whether, upon the evidence, *M. G. Smith* had, in fact, assigned the benefit of the security to his father.

**T**he 37th sect. of the 1 & 2 Vict. c. 100, enacts, that "upon the filing of such petition by such prisoner, it shall be lawful for the said Court for the Relief of Insolvent Debtors, and such Court is hereby authorized and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except, &c., and all the future estate, right, title, interest and trust of such prisoner in or to any real or personal estate and effects, within this realm or abroad, which such prisoner may purchase, or which may

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may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his *final discharge*, in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his *full discharge* from custody without any adjudication being made by the said Court, then before such prisoner shall be so fully discharged from custody; and all debts due, or growing due to such prisoner, or to be due to him, or her, before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of Insolvent Debtors in England," &c. The 38th section provides that a prisoner may be discharged upon bail, and upon certain conditions not amounting to an absolute final discharge.

Mr. *Lloyd* and Mr. *Walford*, for *Smith's* father, contended, that the discharge of the prisoner in 1843, by the detaining creditor, was complete and unconditional, and therefore amounted to a "full discharge" under the 37th section of the 1 & 2 Vict. c. 110; and that this was clearly the meaning of a "full discharge" appeared from the 38th section, which had reference to a discharge upon bail, and upon certain conditions not amounting to a complete discharge; that, consequently, property acquired under the agreement of 1848, did not, under the 37th section of the act, vest in the provisional assignee; secondly, that the deposit being made with *W. Smith*, after the final adjudication in the second, but before the third insolvency, was valid and binding. They cited *Tudway v. Jones* (a); *Ex parte Newton* (b); *Smith v. Smith* (c); *Grange v. Trickett* (d); *Kernot v. Pittis* (e); *Jones v. Gibbons* (f); 1 & 2 Vict. c. 110, ss. 37, 38, 40, 87; 21 Jac. 1, c. 19, s. 11.

Mr.

(a) 1 *Key & Johnst.* 691.(d) 2 *Ell. & Bl.* 395.(b) 4 *Deac. & Ch.* 138.(e) 2 *Ell. & Bl.* 406.(c) 2 *Cr. & Mees.* 231.(f) 9 *Ves.* 407.

Mr. Follett and Mr. Osborne, contra, cited *Stocks v. Dobson (a).*

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BASHAM
v.
SMITH.

The Master of the Rolls.

April 26.

In this case two questions arise; one upon the construction of the statute of the 1 & 2 Vict. c. 110, and the other upon the evidence, whether, in fact, the son has assigned to his father the benefit of the security in question.

It is admitted, that the property, being acquired after the final adjudication in the second insolvency, cannot now be vested in the provisional assignee, by virtue of any proceedings in that matter; and the question is, whether it is vested in the provisional assignee under the vesting order made in the first insolvency, there having been no order made in that insolvency to revest the property in the insolvent. This depends upon the construction of the 37th clause which is in these words—
[His Honor read it (b).]

It is argued, on behalf of the father, that two limits are imposed; that the future property, whatever it may be, which is acquired by the insolvent before his discharge, either by the final adjudication, or before his full discharge by the creditors, is vested in the provisional assignee; but that the "full discharge" by the creditors means, his "full discharge" from prison in a complete and unconditional form.

Upon the whole, I have come to the conclusion that this is the true construction of the act. I think the argument

(a) 4 De G., M. & Gor. 11.

(b) See ante, p. 191.

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argument is correct which says, that the meaning of the word "full," as applied to the word "discharge," is explained by the 38th section, which follows it, and which shews that the insolvent may, in certain cases, obtain a discharge from prison on bail, and upon certain conditions which do not amount to a *full* discharge; and I think, if this be not the real meaning of the word "full," as applied to the discharge of the insolvent debtor, under this clause, that there is no other intelligible or distinct meaning which I can affix to it.

It is justly observed, that the other creditors of the insolvent are not prejudiced by this construction, because, if they objected to the discharge of the insolvent, they might have detained the prisoner, or replaced him in prison, in the event of their claim not being satisfied; but it would be the occasion of a great injury to the debtor, if, when he had paid and satisfied every claim on him, after the vesting order had been made, but had neglected to obtain an order revesting the estate in himself, all his future property should become vested in the provisional assignee. I think that is contrary both to the principle and scope of the act.

It appears to me that the scope of the act is, that the final adjudication of the Court, in the one case, and the unconditional discharge from prison of the prisoner, in the other case, not prevented by any of the other creditors, and which virtually removes the debtor from the operation of the statute, constitute the two periods within which the property acquired by the insolvent debtor, in either alternative, passes to, and is now vested in the provisional assignee.

This, however, does not determine the question in favour of *William Smith*, the father of the insolvent, because

because his son, *Montague George Smith*, became insolvent for the third time on the 9th of February, 1852, under which it is not, and in fact could not be disputed, the property passed to Mr. *Sturgis*, under the vesting order made in that insolvency, if it were then the property of the insolvent, that is, unless a valid and effectual disposition of it had been previously made by *Montague George Smith* in favour of *William Smith*, his father.

Now, the burden of proving this lies upon *William Smith*. Looking at the case in this point of view : viz., that it lies upon him to prove the assignment, the affidavits fail in doing so. The utmost they do, is to raise a suspicion, and it is impossible to say they prove that an assignment was made under which he is entitled. In that state of the case, I am bound to say that the Chief Clerk came to a right conclusion, and I disallow the claim, on the ground that the evidence does not establish it.

I cannot accede to the request which Mr. *Lloyd* pressed upon me, that I would permit the matter to go back into Chambers, to enable Mr. *William Smith* to try to mend the case. Nothing can be more dangerous than to allow a person to mend his case after it has been brought before the Court, when he knows, from the decision of the Court, the exact point where the evidence is considered to fail. I have no doubt what the result of sending it back to the Master would be. As it is clear that Mr. *Smith* cannot mend his recollection in the matter, and as he had gone through all his papers before he made his last affidavit, it is obvious that no beneficial or effectual result would be occasioned by it. I am, therefore, of opinion, that the certificate of the Chief Clerk must be confirmed.

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COOKE v. DEALEY.

Dec. 20, 22.

Subject to the debts, &c., real estates were devised to *A.* They were all sold in an administration suit, to which the devisee was a party. After payment of the debts, &c. there remained a sum in Court at the death of the devisee. Held, that it was of the character of real estate, and passed to her heir.

THE testator, *Samuel Cooke*, directed that all his debts should be paid by his executors out of his personal estate. He devised his real and personal estate to his wife for life, and after her decease, he bequeathed 1,000*l.* to the Plaintiff, and subject thereto, he devised and bequeathed one-fourth of his real and personal estate to his daughter *Eliza Dealey*, and the remainder to other persons.

The testator survived his wife and died in 1851.

A suit was instituted for the administration of the estate, to which *Eliza Dealey* and her husband were parties. By the decree, the usual accounts were directed, and the real estates were ordered to be sold for the payment of the debts and legacies; they were accordingly sold for 4,260*l.* Subsequently to the decree and to the sale, *Eliza Dealey* fell into a state of mental imbecility, and the estates, in consequence, were vested in the purchasers, under the Trustees' Act. *Eliza Dealey* died, and in April, 1855, her husband took out administration. After payment of the testator's debts and legacies, there still remained a surplus of the produce of the real estate in Court. The husband and administrator of *Eliza Dealey* now presented a petition, whereby he claimed one-fourth of the fund in Court, as personal estate; but this claim was contested by her heir-at-law, who insisted that the surplus fund still retained the character of realty.

Mr. *Whitbread*, in support of the petition. The fund in

~~The~~ Court is of the character of personality; it is the produce of a sale directed by the Court, in a suit, to which the owners of the estate were parties, and who must, therefore, be taken to have assented to the sale. The case is similar to *Flanagan v. Flanagan* (a), where too much of the real estate had been sold to pay the debts, and the surplus was held, as between the real and personal representatives of devisees, to be personal estate. In *Oxenden v. Lord Compton* (b), the produce of timber on the estate of a lunatic ordered to be sold in the lunacy was held to be personal assets. So in the matter of *Cross's* estate (c), *Lord Cranworth* ordered money, paid into Court by a railway company, for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, to be paid to his executors. Again, under the 1 Will. 4, c. 65, s. 28, where real estate of a lunatic is sold by the Court to pay his debts, the statute (s. 29) declares, that the surplus produce shall be of the same "nature and character." This shews that, but for this clause and in other cases, it would be considered realty.

Mr. *Lloyd*, Mr. *White*, Mr. *Fleming*, and Mr. *George Law*, contrd. A sale made for a limited purpose will not alter the character of property not required for that purpose. The bill in this case only asked that so much of the real estate might be sold as might be necessary. Too much has been sold by accident and not with the design of changing its nature and character. *Flanagan v. Flanagan* turned on the terms of the decree for payment. *Oxenden v. Lord Compton* (b) was not the case of a sale of the *corpus* of real estate, but of the casual profits of it, and therefore does not apply. In the matter

(a) Stated in 1 Bro. C. C. 500. (c) 1 Sim. N. S. 260.
(b) 2 Ves. jun. 69.

1855.
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Cooke  
v.  
Dealey.

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matter of *Cross's* estate (*a*), depended on the construction of the Lands Clauses Act (8 & 9 Vict. c. 18), and is inconsistent with the other authorities. As a *feme sole*, it was impossible for a married woman to assent; *Field v. Brown* (*b*); or to bind her estate, except under the Fines and Recoveries Act.

Mr. Whitbread, in reply.

The following cases were also cited and commented on:—*Jermy v. Preston* (*c*) ; *Whedale v. Partridge* (*d*) ; *Midland Counties Railway Company v. Oswin* (*e*). See also *In re Taylor's Settlement* (*f*) ; *In re Horner's Estate* (*g*) ; *In re Stewart* (*h*) ; *Ex parte Walker* (*i*) ; In the Matter of *Wharton* (*k*) ; *In re Sloper* (*l*), in which the Lords Justices held, that the purchase-money paid by a railway company, for lands belonging to a lunatic, was to be treated as realty.

The MASTER of the ROLLS.

I will dispose of this case on Monday.

Dec. 22.

The MASTER of the ROLLS.

This petition relates to the question of conversion, and I was desirous, before deciding the case, to look at two authorities cited by Mr. *Whitbread*, which appeared to

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| (<i>a</i>) 1 <i>Sim. N. S.</i> 260. | (<i>g</i>) 5 <i>De G. & Sm.</i> 483. |
| (<i>b</i>) 17 <i>Brow.</i> 146. | (<i>h</i>) 1 <i>Sm. & G.</i> 32. |
| (<i>c</i>) 13 <i>Sim.</i> 356. | (<i>i</i>) 1 <i>Drew.</i> 508. |
| (<i>d</i>) 8 <i>Ves.</i> 235. | (<i>k</i>) 5 <i>De G., M. & Gor.</i> 33. |
| (<i>e</i>) 1 <i>Colly.</i> 80. | (<i>l</i>) MS. 5th <i>May</i> , 1854. |
| (<i>f</i>) 9 <i>Hare</i> , 596. | |

~~to have a very strong bearing, and of the latter of which I was not aware.~~

1855.

~~COOKE~~~~v.~~~~DEALEY.~~

The question is, whether certain money in Court, arising from the sale of a real estate directed to be sold, belongs to the heir or to the personal representative. The general rule undoubted is, that the conversion of real estate into personality only takes effect to the extent of the object required, and therefore to this extent the conversion takes effect, but beyond that, the rights of all parties remain the same as if no conversion or sale had taken place; this was decided in *Ackroyd v. Smithson* (a), so celebrated for Lord Eldon's argument, and in many other cases.

If the matter stood there, I should have thought that there was no question on the subject, but Mr. Whitbread cited two cases which seemed to shew, that a different rule prevailed in lunacy, where the Court considered, that it would be for the benefit of the lunatic that a sale of his real estate should take place, and he argued that this view was confirmed by the 28th section of the statute 1 Will. 4, c. 65, which says, that conversion shall not take place in a particular event, from which he inferred, that but for this statute, it would take effect in all other cases.

I think, however, that the authorities cited, and rules in lunacy, do not alter the principle in these cases. More of the real estate was sold than was necessary; of course, the conversion is complete to the extent to which the purchase-money was required for the particular object for which the sale took place, namely, for the payment of the debts and costs, but the excess, though in the form of money, remained, as before, impressed with the character of land.

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(a) 1 Bro. C. C. 503.

1855.

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 COOKE  
 v.  
 DEALY.

The money was raised by sale instead of by mortgage, and for the convenience of the purchaser too much was sold, the excess, therefore, beyond what was required retains its original character of realty.



The case of *Oxenden v. Lord Compton* (*a*) was, in my opinion, rightly distinguished by Mr. *Lloyd*; that was a case more in the nature of emblements or growing crops of an estate, and may be distinguished from what may be called the proceeds of the sale of the estate itself. In that case, timber on the estate of a lunatic had been cut and sold by order of the Court, on a report that it would be for his benefit, and the produce was held to be personal and not real estate, because it was part of the fruits of the real estate come to maturity. It was like the produce of a coppice, which is usually cut every eighteen or twenty years, which would be the profits of the estate the same as any other crop. Timber had been sold in the judicious management of the estate, and the produce was held money, and belonged not to the heir but to the personal representative.

The other case, *In re the Matter of Cross's Estate* (*b*), is one of greater difficulty, but I think that it does not affect the question; the case turned on the construction of the Lands Clauses Act, and does not vary or affect this case.

I am therefore of opinion that all the money not required for the purpose of the suit and not disposed of in the performance of the order and decree of the Court, belongs to the parties in its original character, that is, it remains real estate, and goes to the heir at law.

(*a*) 2 *Ves. jun.* 69.

(*b*) 1 *Sim. N. S.* 260.

1856.

April 17,  
18 and 19.*In re RADCLIFFE.*

**WILLIAM CLARK** being entitled under the will of *Mary Radcliffe* to one-eighth of a sum of stock, in reversion expectant on the death of his mother, *Sarah Clark*, mortgaged the same in 1834 to *Parken*, to secure the sum of 80*l.* and interest, and *Sarah Clark*, then a widow, joined in the mortgage, and assigned to *Parken* the dividends of the stock during her life. Afterwards, *Elizabeth Clark*, another of the children of *Sarah Clark*, mortgaged her one-eighth to *Parken*, to secure 80*l.* and interest, her mother also joining in the mortgage.

**I**n 1840, *Elizabeth Clark* died unmarried and intestate, but no administration had been taken out to her estate.

**I**n 1845, *Parken* assigned both securities by way of mortgage to *Hart*, without the concurrence of the mortgagors therein, and in 1852, *Hart* and *Parken*, without the concurrence of the parties interested, assigned the securities to *Webster*, together with a sum due to *Parken* for interest, and also certain sums claimed by him in respect of costs of transfer.

**I**n 1854, the fund was paid into Court, and the debt to *Webster* having been reduced by payments, he assigned the balance, together with the securities, and also the interest remaining due and the costs of transfer to *Popkin*.

*Popkin*

When the interest of a mortgage is regularly paid and the mortgagor has never been called on to discharge the principal, the costs of a transfer of the mortgage, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him.

1856.

*In re*  
RADCLIFFE.

*Popkin* having presented her petition, an order was made on the 12th of *January*, 1856, that an account should be taken of what was due to the Petitioner, under the two securities of 1834, the assignments of 1845, 1852, and 1855, and the costs of the application. The Chief Clerk refused to allow the costs of the transfers.

Mr. *Rouppell* and Mr. *C. Webster*, for the Petitioner. The time for redemption having expired, and the mortgage debt not having been paid, the mortgage became absolute; the mortgagee was then entitled to assign the securities without the concurrence of the mortgagor, and the costs are, of course, a charge on the mortgaged premises. Besides this, one of the mortgagors was dead, and representation to her estate has not yet been taken out, and as to that mortgage, therefore, no concurrence in a transfer could have been obtained from any one qualified to give it. The costs are properly mortgagees' costs; *Wetherell v. Collins* (*a*). No case can be found directly applying to the case of transfers, but the principle is to give complete indemnity to the mortgagee; *Bartle v. Wilkin* (*b*); *Coles v. Forrest* (*c*); *King v. Smith* (*d*); *Smith v. Chichester* (*e*); *Higgins v. Frankis* (*f*); *Waddilove v. Taylor* (*g*); *Daniell's Pr.* (*h*); *Seton on Decrees* (*i*).

The MASTER of the ROLLS referred to *Martin's Case* (*k*).

Mr.

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|-----------------------------------------------|-------------------------------------------------------|
| ( <i>a</i> ) 3 <i>Madd.</i> 255.              | ( <i>g</i> ) 6 <i>Hare</i> , 307.                     |
| ( <i>b</i> ) 8 <i>Sim.</i> 238.               | ( <i>h</i> ) Pages 196, 1036 (3rd ed.).               |
| ( <i>c</i> ) 10 <i>Bew.</i> 552.              | ( <i>i</i> ) Page 192 (2nd ed.).                      |
| ( <i>d</i> ) 6 <i>Hare</i> , 473.             | ( <i>k</i> ) 5 <i>Bing.</i> 160; 2 <i>M. &amp; P.</i> |
| ( <i>e</i> ) 2 <i>Dr. &amp; War.</i> 393.     | 240.                                                  |
| ( <i>f</i> ) 15 <i>L. J. (N. S.) Ch.</i> 329. |                                                       |

**Mr. Lloyd** and Mr. **Smyth**, in support of the certificate, were not heard.

1856.

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In re  
RADCLIFFE.

The Master of the Rolls said he would look into the authorities and speak to the Chief Clerk about the case before hearing the other side. That it looked like a transaction behind the backs of the mortgagors; but it might be, that the costs of these transfers were mortgagees' costs, though not costs in a suit.

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**The Master of the Rolls.**

April 19.

I have considered this case, and I think it unnecessary to hear any argument on the other side. I have referred to the authorities cited, but this observation applies to them all, namely, that they refer to mortgagees' costs of suit. I do not doubt that where a mortgagee has incurred costs in relation to his security, by the acts or defaults of the mortgagor, the latter must bear them, except under special circumstances. The case of *Shackleton v. Shackleton* (a) can hardly be considered an exception to that rule. But this case, as well as other cases, refer to the costs of persons made parties to a suit. The question here is, whether if a mortgagee assigns his mortgage without the knowledge of the mortgagor, without having called upon him to pay the mortgage debt, or taken any steps to compel payment, he can add the costs of the transfer to his debt. I think not, and I find that the practice of Conveyancers is to treat him as not being so entitled (b). There is no precise authority on the point; all the cases tend that way, and *Martin's Case* (c) is to the same effect. I think it would

(a) 2 Sim. & St. 242.  
(b) See 6 Blyth. (2nd ed.) 391, (c) 5 Bing. 160.

1856.

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In re
 RADCLIFFE.

would be unfair that a mortgagor who has regularly paid his interest, and has not been called upon to pay the principal, when he comes to redeem, should be charged, in addition to the mortgage debt, with the costs of the transfer of the mortgage, and that he should be bound to pay the expense of a second investigation of the title and the other expenses incident to the transfer. If it were to hold good for one assignment, it might do so for any number. I therefore think the Chief Clerk was right in refusing to allow those costs to be added to the mortgage, and that the Petitioner must pay the costs of this application.

May 23.

Parties interested in a fund standing in the name of the Accountant-General in one suit, were ordered to pay the Defendants in another suit their costs. These being taxed, and a minute having been left with the senior Master of the Common Pleas, this Court, on petition, made a charging order on the fund for such costs, and granted an interim stop order.

WELLS *v.* GIBBS.

UNDER a settlement, dated in 1819, *Fanny Freeman* was tenant for life of a fund, with remainder to her children.

This suit was instituted by the children of *Fanny Freeman* against the trustees of the settlement to compel them to make good the trust fund.

Under the decree, made in 1843, the trust fund, consisting of 1,637*l.* Consols, was paid into Court, and the income was ordered to be paid to *Fanny Freeman* for life, with liberty to apply on her death.

In 1853, the children instituted a suit of *Freeman v. Stone* against the trustees of the will of *William Wells*, and by the decree, made in February, 1855, the Plaintiffs were ordered to pay the Defendants' costs. They were

were taxed at 326*l.*, and a memorandum was, in November, left with the senior Master of the Common Pleas, as required by the Act. *Fanny Freeman*, the tenant for life, died in May, 1856.

1856.

WELLS
v.
GIBBS.

A petition was presented by the Defendants in *Freeman v. Stone* for a charging order *nisi* on the shares of the children in the 1,637*l.* still standing in Court, and for a stop order on the fund.

Mr. *Fooks*, in support of the petition, submitted that a decree of this Court was equivalent to a judgment at law, and that this Court had now jurisdiction to make a charging order on a fund standing in the name of the Account-General, where it was chargeable, by the act, under a decree in equity, as distinguished from a judgment at law; *Stanley v. Bond* (*a*), and that it could secure the fund in the meanwhile by a stop order; *Courtney v. Vincent* (*b*); *Watts v. Jefferyes* (*c*). He relied on the statutes of 1 & 2 Vict. c. 110, ss. 14, 15, 18, 19, and 3 & 4 Vict. c. 82, s. 2, and on the General Order of the 3rd of April, 1841 (*d*).

The Master of the Rolls at first doubted as to the propriety of making the order (*e*), but ultimately he ordered that the shares of the children "be charged with the payment" to the Petitioners of 326*l.* and interest, unless the children should "within seven days after service of the order, shew unto the Court good cause to the contrary." He also granted an interim stop order.

The Petitioners obtained payment of their demand, and the residue of the fund was distributed.

June 30.

- (*a*) 7 Beav. 396.
- (*b*) 15 Beav. 486.
- (*c*) 3 Mac. & G. 372.
- (*d*) Ord. Cun. 161.

- (*e*) See *Miles v. Presland*, 2 Beav. 300; 4 My. & Cr. 431; *Hulkes v. Day*, 10 Sim. 41.

1856.



DAVIDSON v. ROOK.

May 27.

A testator empowered his widow, if his children should conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation, but not otherwise, to give them 1,000*l.* each, for the purpose of setting out in the world. Held, that she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried.

THE testator having two children expressed himself as follows:—Provided always, and my mind and will further is, that if my dear children or either of them should conduct themselves well and to the satisfaction of their mother, up to the full age of twenty-five years, and marry with the approbation of their mother, but not otherwise, then she is hereby authorized and empowered to sell out 1,000*l.* Stock £3 per Cent. Reduced Annuities for *Harriett Rook*, and the like stock for *John Rook* of 1,000*l.* £3 per Cent. Reduced Annuities, out of my stock in the Bank of *England*, for the purpose of each of them setting out in the world.

The testator died in 1845, and both *Harriett* and *John Rook* had now attained twenty-five, but neither of them had married. One question was, whether the widow had power to appoint 1,000*l.* each to the children after they attained twenty-five, but before their marriage.

Mr. W. R. Ellis, for the Plaintiffs.

Mr. Cracknall, for Mrs. *Rook*.

Mr. Torriano, for the two children.

Mr. Nichols, for the executors.

The Master of the Rolls.

I think the widow has the power, on the children respectively attaining twenty-five, to sell out, 1,000*l.* Stock for them respectively, although they may be unmarried, but this is a discretionary power.

1856.

WRIGHT v GOFF.

April 25.

THE testator, by his will, dated in 1800, gave his real and personal estate to trustees, in trust as to one-third to his daughter, Mrs. *Wright*, for life, with a power which, it was assumed, authorized an appointment to her children only. The other two-thirds were subject to similar trusts in favour of Mrs. *Wright's* two sisters. Mrs. *Wright* had two daughters only, viz., *Emily*, the wife of Mr. *Shey*, and *Helen* who died unmarried in 1837.

The Plaintiff, *Robert Henry Wright*, though some way connected, was stated by the Court to be, "in law, an entire and complete stranger to the family."

By indenture of appointment, dated the 9th of April, 1838, and made between Mrs. *Wright* of the first part, Mr. and Mrs. *Shey* of the second part, and three trustees of the third part, reciting the will of the testator, and reciting that Mrs. *Wright*, and also Mr. and Mrs. *Shey*, were desirous that the power of appointment given to Mrs. *Wright* by the will should be exercised by appointing 2,000*l.*, part of the personal estate, consisting of stock in Court, over which she had such power of appointment, for the benefit of *Robert Henry Wright*, and by appointing the remainder of such stock, and also the remainder of the property of the testator, over which Mrs. *Wright* had any power of appointment, for the benefit

jealousy, and must be convinced that there has been a mistake on the part of all parties to the deed, before it will reform it.

A valid settlement was revoked by a subsequent deed poll, executed for a different purpose. The mistake being proved, the latter was reformed.

A. B., a tenant for life, had a power of appointing a fund amongst her children. There being only one object of the power, viz., *C. D.*, who was a married woman, an arrangement was come to between *A. B.* and *C. D.* and her husband, whereby the whole fund was appointed to *C. D.* and then resettled, giving an interest to *C. D.*'s children and to *E. F.*, a stranger. The husband survived. Held, that the transaction was binding on him and his representatives.

On an application to reform a deed, the burden of proof lies on the Plaintiff, the Court examines the evidence very

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benefit of Mrs. *Skey* and her children; but that, inasmuch as it was considered that such appointment would exceed the scope and purport of the power given to Mrs. *Wright*, and would not be authorized thereby, Mr. and Mrs. *Skey* had consented and agreed to join and concur in the indenture of appointment, for the purpose of testifying their approbation to such exercise or attempted exercise of the power, and for satisfying and giving effect to the same; and in order and to the intent, that such appointment might be construed and taken as an appointment made solely in favour of Mrs. *Skey*, and as a resettlement, by Mr. and Mrs. *Skey*, of such appointed property, estate, funds and premises, upon the trusts and in manner thereafter mentioned; IT WAS WITNESSED, that in pursuance of such desire, and in consideration of natural love and affection, Mrs. *Wright*, in exercise of the power for that purpose reserved in the will of the testator, and of all other powers enabling her in that behalf, thereby, at the request and by the direction of Mr. and Mrs. *Skey*, appointed, and Mr. and Mrs. *Skey* covenanted, granted and agreed with the trustees, that the one-third part of the stock should, after the decease of Mrs. *Wright*, be transferred into the names of the said trustees, upon trust, as to 2,000*l.* thereof, for the benefit of the Plaintiff, *Robert Henry Wright*, and as to the remainder of the personal estate, and the one-third of the real estate, to Mrs. *Skey*, for life, with a power to appoint amongst her children.

This indenture contained a power of revocation, and new appointment by deed or will.

In 1846 it became desirable to sell the testator's *real* estate, and Mr. *Harley* (the husband of one of Mrs. *Wright's* sisters), who principally acted in arranging the sale, employed Mr. *Jesson* as solicitor in the matter.

The

The entirety of the estate was accordingly sold in *October*, 1846, and Mr. *Jesson* being wholly ignorant of the existence of the deed of the 9th of *April*, 1838, and which had been prepared by Mr. *Satchell*, advised, that to complete the sale, it would be necessary that Mrs. *Wright* should appoint her one-third share thereof to her then only surviving child, Mrs. *Shey*, who could then join in and effectuate the sale. By the instruction of Mr. *Harley*, who was also ignorant of the deed of 1838, Mr. *Jesson* prepared a deed poll, dated 28th *December*, 1846, whereby Mrs. *Wright* appointed the whole of her third share of the real estate, and *also of the residuary personal estate, to Mrs. Shey*, and he transmitted it to Mr. *Harley*, who got it executed by Mrs. *Wright*.

This was followed by a deed of *May*, 1847, resettling the real estate.

It was proved by the evidence (as the Court held), that neither Mr. *Harley* nor Mr. *Jesson* knew of the existence of the deed of 1838; that the deed poll was executed by Mrs. *Wright* without professional assistance; that she was old and almost blind; that the deed was not read over to her, and that she could not read it herself; that the object of the deed poll was to effect the sale merely, and that Mrs. *Wright* would not have executed it, had she known it would revoke the deed of 1838; that the deed poll was not submitted to Mr. *Satchell*, and that it was so recited in the conveyance of the real estate, as to lead him to suppose that it only comprised *real estate*; that Mrs. *Wright* afterwards frequently referred to the deed of 1838 as valid, and by her will, made in *June*, 1847, she confirmed the deed of 1838, and in another will in *September*, 1849, she gave the Plaintiff the bulk of her property, and in another will in *October*, 1853, she did the same, but in neither

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of these last two wills did she refer to the deed of 1838, owing as was believed to the death of Mrs. *Skey* previously. Besides all this, in *March*, 1852, Mrs. *Wright* appointed new trustees of the deed of 1838.

Mrs. *Skey* died in 1848, Mr. *Skey* in 1852, and Mrs. *Wright* in 1855. The Plaintiff by this suit sought to rectify the deed of 1846, so as to exclude from its operation the 2,000*l.* settled upon him by the deed of 1838, contending that it had been executed by Mrs. *Wright* under a mistake, she having no intention, by executing the deed of 1846, to deprive the Plaintiff of the provision made for him by the deed of 1838.

*Mr. Roupell* and *Mr. Hardy*, for the Plaintiff.

*Mr. Selwyn* and *Mr. Fordham*, for *Newman*, the trustee of the deed of 1838.

*Mr. Lloyd* and *Mr. Shebbeare*, for *Goff*, the representative of Mr. *Skey*.

The following cases were cited :—Lady *Shelburne* v. Lord *Inchiquin* (*a*) ; Marquis of *Townsend* v. *Stangroom* (*b*) ; *White* v. *St. Barbe* (*c*).

*Mr. Roupell* was not heard in reply.

#### *The Master of the Rolls.*

There are two questions to be considered ; the first as to the validity of a deed of appointment executed by Mrs. *Wright* on the 9th of *April*, 1838, and the second whether

(*a*) 1 *Bro. C. C.* 339.  
 (*b*) 6 *Ves. 328.*

(*c*) 1 *Ves. & B.* 399.

whether the deed of 1846, purporting to revoke or alter the deed of 1838, can now be reformed so as to allow that deed full operation.

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I first consider the question of the validity of the deed of the 9th of *April*, 1838. At that time, Mrs. *Wright* had but one daughter surviving, and therefore there was, in fact, but one object of the power surviving, who being a married woman, Mrs. *Wright* had only a limited power of modifying the manner in which Mrs. *Skey* should take the estate. An arrangement is made, after much consideration, as appears from the evidence, under which this deed of the 9th of *April*, 1838, was executed, and a settlement is made to this effect:—Mrs. *Wright* appoints the real and personal estate to Mrs. *Skey* absolutely, and thereupon the property is settled by Mr. and Mrs. *Skey* in such a manner as to give Mrs. *Skey* an estate for life in it, with a power of appointment among her children, and in default of appointment to herself absolutely; and at the same time, there was excepted out of the property 2,000*l.* in favour of the Plaintiff, who is, in law, an entire and complete stranger to the family. It is to be observed that not only the Plaintiff but the children of Mrs. *Skey* also were strangers to the trust, for they were not the objects of the power of appointment, and could not become the appointees under it. The question is, whether this deed of 1838 is a valid deed of appointment?

It was suggested, in the first place, that this was a fraud upon the power, and that if the donee of a power appoints to an object of the power, reserving to himself the means of benefiting a stranger to the power, this would be a fraud upon the power. No doubt, in many cases, it would be so, but I don't think it can be in this. In the course of events this might have happened, if

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Mrs. *Wright* made no appointment of the fund, or if she made any appointment, and Mr. and Mrs. *Skey* had not concurred in the settlement of the fund, Mr. *Skey*, upon surviving his wife, would take it absolutely, and might have thus disappointed all the children. To avoid this, an arrangement is made (for that appears to me to be the clear effect of the evidence, and of the deed taken together) by which Mrs. *Wright* says, "I will make an appointment at once, if you, the husband, will settle the property thus appointed; first, in such a manner that your children, that is, my grandchildren, who are not the objects of the power, shall nevertheless take an interest in it." If the deed had stopped there, I entertain no doubt that it would have been a valid and effective family settlement; because there would have been a sufficient motive and consideration to enable the grandchildren of Mrs. *Wright* afterwards to insist that their father, Mr. *Skey* (if he survived both Mrs. *Wright* and his wife), should not take the fund for his own benefit, and to enable them to say, that he had entered into a contract, by which the fund was so settled that he could not afterwards disappoint them.

Arriving at that conclusion, I am also of opinion that the deed cannot be good in part and bad in part, and the deed being good so far as regards the interest taken under it by the children, the arrangement by which this settlement was come to,—by which 2,000*l.* was given to a stranger to the trust,—is also valid, and that the deed, in that respect also, is effectual.

Having come to the conclusion that this was a good deed when it was executed, the next question is, whether it can be varied by the subsequent circumstances? Though the deed of 1846 appointed the whole of the real

real and personal property in favour of Mrs. *Skey*, it appears that it was not the intention that she should take the whole for her own benefit, because the deed was immediately followed by a deed of *May*, 1847, by which three-eighths of the real estate conveyed by the deed is settled upon certain trusts, which are not in accordance with the deed of 1838, but are, in some respects, a variation or rather a resettlement of it.

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Mr. *Lloyd* argued, that a family arrangement is not binding upon the parties, unless it is carried into full effect; but it is to be observed, that if a power is reserved to the parties to that deed to vary or alter it, at any subsequent period, and they do subsequently vary or alter the arrangement, that alteration and variation will be valid and binding, and therefore, as the deed of 1838 contained a power of revocation, and as all the settlors or the parties beneficially entitled, who executed the deed of 1838, were parties to the deed of 1847, I think they had a power to revoke it by that deed, and, if nothing else had taken place in this case, I should have held, that the deed of 1838 operated in favour of the children, so far as the personal estate was concerned, and that the real estate was governed by the trusts of the deed of *May*, 1847, which had varied the trusts of the deed of 1838 to some extent. I do not think, therefore, that the variation invalidates or takes away the conclusiveness and the binding character of the deed of 1838.

The next question is, whether the deed of 1846, which revokes the deed of 1838, is binding upon the parties, or whether it ought to be reformed to any and what extent, or, if not reformed, this Court should make a declaration to the effect that this deed binds the interests of the parties? It is said that the deed of

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1846 was not intended to have the effect it appears to have. In this part of the case I fully concur in the observation of Mr. *Lloyd* and Mr. *Shebbeare*, that the burden of proof lies upon the Plaintiff, and that this Court, upon an application to reform an executed deed, looks at the evidence in a very jealous manner ; and that it must be convinced that there has been a mistake on the part of all the parties executing the deed, before it will reform and alter the deed in any degree. This is the case of a deed poll, and therefore, with respect to the parties to it, it is only necessary to prove the mistake on the part of Mrs. *Wright*, who was the only person who executed it.

The evidence, with respect to what took place at the time, is very strong. Mr. *Jesson*, who prepared the deed of 1846, says, that he had no knowledge of the existence of the deed of 1838, and that he does not believe that Mr. *Harley*, who instructed him, had any knowledge of it, for that otherwise he would have informed him upon the subject. He says, that at the time he prepared the deed, it did not enter into his head that it was to affect any previous transaction, nor did he give any direction to communicate that to Mrs. *Wright*. It is suggested that the deed was not read over to her : and this lady being then unable, apparently from the infirmity of old age and occasional blindness, to read the deed herself, and it being essential that the deed should be read over to her, this could not, consistently with the other facts, have been done by any person other than Mr. *Harley*. It is suggested that it was the duty of Mr. *Harley* to read it over and explain it, and therefore it must be inferred that he did it. But it is to be observed, that if Mr. *Jesson* is right, Mr. *Harley* could not have explained it, because the thing important to inform her of was this :—that the deed of 1846 would disappoint the provision

vision she had made by the deed of 1838, not merely in favour of her grandchildren, but also in favour of the Plaintiff: that it would disappoint the appointment of 1838, and would give an absolute interest in the property to her daughter, so that if her husband survived her, it would enable him to take the absolute interest, at least so far as the money was concerned. Mr. *Harley*, if he was ignorant of the deed of 1838, could not have explained this. It is therefore, I think, established, in this case, that the effect and operation of the deed of 1846 upon the deed of 1838 was not communicated to this lady. It is therefore impossible to say that she had an intention to affect the operation of the first deed. I have no doubt from the evidence that this was communicated to her:—that it was necessary, for the purpose of selling this property and giving a title to it, that she should execute this deed, and accordingly she executed this deed with that view and for that purpose only; which clearly would not involve an intention of revoking the deed of settlement of the property of 1838.

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This is confirmed by subsequent facts. In the first place, it is shewn that she was not intending by that deed to give the whole of the property to her daughter; that is proved as to the real estate, because, with respect to the real estate, three-eighths, and not the whole of it, are immediately afterwards settled by the deed of *May*, 1847. We have also this evidence:—that Mrs. *Wright*, immediately after the execution of the deed of *May*, 1847, sends for her solicitor, Mr. *Satchell*, who prepared the deed of 1838, and desires to have some addition or alteration made to her will. She refers to and recites the deed of 1838 as a valid and subsisting deed, and she refers to the deed of 1846 as if it solely affected the real and not the personal estate, and she makes a provision for the Plaintiff, in addition to that given by the deed of

1838.

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1838. Seeing, therefore, that this occurred in the very month after Mrs. *Wright* had settled the money or a portion of the money arising from the real estate, I think it may be fairly inferred that she supposed this deed of 1838 was a valid and subsisting deed as affecting the parties connected with it. This is again confirmed by the deed of the 29th of *May*, 1852, when, at her request, new trustees were appointed of the deed of 1838, an act wholly nugatory and useless, unless she believed it to be a valid and subsisting deed.

I am therefore convinced, from all the facts of the case, that Mrs. *Wright* had no intention, by this deed of *December*, 1846, to affect the deed of *April*, 1838, or any belief or notion that she was so doing, and that therefore, if this deed of 1846 had the effect of revoking the deed of 1838, it is proper for this Court to say, that it was executed under a mistake, and contrary to the intention of the person executing it, and that accordingly it ought to be reformed.

My opinion therefore is, that the deed must be reformed for the purpose of preventing its operating upon so much of the deed of 1838 as is not afterwards affected by the deed of *May*, 1847.

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1855.

## IRBY v. IRBY.

Nov. 7.

**O**N the 8th of *June*, 1805, a sum of 13,000*l.*, trust moneys, was lent by the trustees to Sir *William De Crespigny*, on mortgage of his real estates. He died in 1829, and in 1830, the amount being unpaid, a bill was filed by parties interested in the money and under his will, against the trustees, the executors of Sir *William De Crespigny*, and others, to establish his will, to administer his real and personal estate, and if his personal estate should be insufficient to pay the 13,000*l.*, then to raise it by a sale of the real estate.

Under the decree and orders in the cause, the mortgaged estate was, from time to time, sold, and the purchase-moneys, as received, were paid into Court to a general account, and invested and accumulated. At the date of the Master's report, in 1841, there were arrears of interest due to the mortgagees amounting to the sum of 7,741*l.*

The cause now came on for further directions and on a petition, when

Mr. *Lloyd* and Mr. *Dryden*, for the Plaintiffs, asked for a declaration, that the money produced by the sale of the mortgaged estates, from time to time, were applicable in satisfaction of the mortgage, and that the mortgagees and their *cestuis que trust* were entitled to the purchase-money, and to the benefit of the investment and of the accumulations of the dividends. They argued, that the money produced must be considered as appropriated,

A mortgagor died, and a bill was filed by the mortgagee for the administration of the estate and payment of the mortgage. The mortgaged property was sold, and the produce paid into Court to a general account, and accumulated for a series of years. Held, that the mortgagee had no right to treat the fund as appropriated to the mortgage, and take the accumulations.

A mortgagor died, having made his real estate equitable assets. Defendants, who were both mortgagees and bond creditors, were held not entitled to tack.

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priated, from time to time, in payment of the mortgage, so as to entitle the mortgagees not only to the purchase money of the mortgaged estate itself, but to the stock in which it was invested, and to the accumulations.

Mr. R. Palmer and *Mr. Hobhouse* for the trustees.

Mr. Bagshawe, *Mr. Smythe*, and *Mr. G. L. Russell* for *Mr. Heaton De Crespigny*, and parties claiming under him.

Mr. Follett, *Mr. Bush*, and *Mr. Jessel* for other parties.

Mr. Roupell and *Mr. Chichester* for the executors.

Armstrong v. Storer (a) was cited.

The Master of the Rolls.

The case has been very ingeniously argued, but I am not satisfied that I ought to allow the mortgagees to claim the particular sums as specifically belonging to the mortgage.

Observe, this is a suit to enforce a mortgage security, and also to administer the estate of the testator, by the realization of the assets for that purpose. I will assume that the purchase-moneys have been carried to one general account. If the mortgagees and their *cestuis que trust* were entitled to those funds as specifically belonging to and the fruit of their mortgage, they ought either to have got it carried

(a) 14 *Beav.* 535.

carried to a separate account, or have asked for payment.

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**Iazy
v.
Iazy.**

I must treat this as a fund to be administered according to priorities, and the mortgagee will get the 13,000*l.* and the interest in the first instance (*a*).

The testator had devised his real estates so as to make them equitable assets. The trustees were both mortgagees and bond creditors of the deceased.

Mr. R. Palmer and Mr. Hobhouse claimed a right to ~~tack~~, and insisted, that as they could only be redeemed on payment both of the mortgage and bond debt, they had the same right against the fund in Court. They cited *Rolfe v. Chester* (*b*).

The MASTER of the ROLLS held that no right to tack existed.

(a) See *Thomas v. Montgometry*, 1 Russ. & Myl. 729. **(b)** 20 Beav. 610.

1855.

Dec. 8, 10.

1856.

March 18.

A benefit building society took a mortgage from a member before its rules had been certified and deposited. These formalities having afterwards been complied with, it was held, that the deed was exempt from the stamp duty under the 6 & 7 Will. 4, c. 32,

and 10 Geo. 4, c. 56, ss. 7, 37.

WILLIAMS v. HAYWARD.

ON the 21st of February, 1850, *Jones* conveyed to the Plaintiff a leasehold property by way of mortgage, to secure 320*l.*, and the deed contained a power of sale authorizing the Plaintiff, in default of payment, to sell the property and give valid receipts for the purchase-money. The Plaintiff was the trustee for a benefit building society, established under the 6 & 7 Will. 4, c. 32. This statute (a) extends the benefit of the Friendly Societies Act (10 Geo. 4, c. 56) to benefit building societies.

By the 4th sect. of the 10 Geo. 4, c. 56, the rules are to be certified by the barrister, and then deposited with the clerk of the peace, and confirmed by the justices.

By the 7th section of the same Act, no society "shall have the benefit of the Act, unless all the rules" shall be entered in a book, &c., "and unless such rules shall be" transcribed, "and such transcript deposited with the clerk of the peace." The 37th section exempts the securities given on account of the society and other matters from stamp duty.

In the present case, although the society had been established in 1849, the rules had not been deposited nor had the certificate been obtained until September,

1850,

(a) Sect. 4.

1850, which was subsequent to the date of the mortgage.

In 1852, the Plaintiff, by virtue of the power of sale contained in the mortgage, contracted to sell the premises to the Defendant, and this was a suit instituted by the vendor to compel the purchaser specifically to perform the agreement.

The mortgage deed was not stamped, and one of the purchaser's objections arose out of that circumstance.

Mr. Hobhouse for the Defendant, the purchaser. This mortgage deed is not exempt from stamp duty, and the vendor is therefore bound to perfect it, by getting the proper *ad valorem* stamp affixed, for otherwise it is void (*a*). By the 10th Geo. 4, c. 56, s. 7, no society is entitled to the benefit of the Act, unless the rules have been certified and deposited; at the date of the mortgage this had not been done. A number of persons cannot vote themselves a friendly or benefit building society, and then, without complying with the requisitions of the statute, avoid paying the ordinary stamp duties. The policy of the Act was to allow nothing to be done until the society had been formed and the rules approved of, certified and deposited.

Mr. Freeing contra. No stamp is required (*b*). The Act contains no condition precedent and the 4th section is merely directory. The language of the 7th section is, "unless," and not "until," so that when once certified the society enjoys an immunity from stamp duty. In the

(*a*) See 4 & 5 Will. 4, c. 40; (*b*) See *Walker v. Giles*, 6 C.B. 6 & 7 Will. 4, c. 32, s. 4; 9 & 10 Vict. c. 27; and 18 & 19 Vict. c. 63. 662; and *Burnard v. Pilsworth*, ibid. 698, note.

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the same section the word "until" is used with regard to new rules being in force ; the distinction is therefore marked. The 4th section of the 10 Geo. 4, c. 56, is repealed by the 4 & 5 Will. 4, c. 40, s. 3 ; therefore it may be considered struck out. The subsequent acts adopt the same phraseology.

It is plain that some preliminary matters were necessary to be done for the mere establishment of the society, and money was necessary before the certificate could be obtained ; and surely such necessary acts would be protected from the stamp duty.

Mr. *Hobhouse*, in reply. If the last argument were to prevail, a society might go on for any length of time without the certificate and deposit of the rules, and then, by *ex post facto* formalities, these prior deeds, which up to that time were void for want of a stamp, would become valid. The 7th section is imperative :— no society *shall* have the benefit of the Act unless, &c.

The Master of the Rolls said he would consider the case.

Dec. 10.

The Master of the Rolls held that no stamp was required.

1856.

March 18.

On the 18th of *March*, 1856, a decree was made for specific performance, but without costs.

1856.

COWPER v. MANTELL. (No. 1.)

COOPER v. MANTELL. (No. 1.)

April 25.

BY his will, dated the 16th *May*, 1831, the testator directed his trustees to stand possessed of his leaseholds at *Longcot* (subject to the two annuities thereafter charged thereon) upon certain trusts for his nieces and their issue. And he directed his trustees, out of the rents of these leaseholds, to pay his nephew, *James Hammond*, an annuity of 60*l.* for life, and another annuity of 100*l.* to another nephew for life.

A testator bequeathed leaseholds, subject to the payment thereout of an annuity to *A. B.* He afterwards assigned the leaseholds on other trusts, and reserved a power to appoint a like annuity to *A. B.* Subsequently, he confirmed his will, but he did not, in terms, execute his power. Held, that the annuity failed.

An addeemed bequest is not set up again by a subsequent confirmation of the will.

Five months afterwards, on the marriage of his niece, *Eliza Hammond* (*Mrs. Brooks*), the testator executed a settlement, dated the 1st of *October*, 1831, whereby he assigned the leasehold at *Longcot* on trusts for himself for life, with remainder to his niece and her issue. And he thereby reserved to himself a power, by deed or will, to appoint any annuity, not exceeding 60*l.*, to *James Hammond*, and a like annuity of 100*l.* to another nephew, to be issuing and payable out of the rents of the *Longcot* leasehold.

Afterwards, on the 15th of *February*, 1832, the testator made a codicil, whereby, after making some dispositions not affecting the question, he "in every other respect" ratified and confirmed his will.

On the 20th of *February*, 1832, he made another codicil, by which he gave *James Hammond*, "in addition to the provisions by his will and codicil already made," 2,000*l.*, and it ended thus:—"I ratify and confirm my last will and testament, which bears date on or about

1856. the 16th of *May*, 1831, and also the codicils I have thereto made."

Cowper

v.

Mantell. The testator died in 1832, and the question was, whether the annuity of 60*l.* given by the testator to his nephew, *James Hammond*, was payable.

Mr. *Lloyd* and Mr. *Morris*, for the Plaintiff.

Mr. *R. Palmer* and Mr. *Osborne*, for the Defendant, Mrs. *Brooks*. The annuity was revoked by the subsequent assignment and settlement of the leaseholds, and a revoked charge cannot be revived by a subsequent republication of the will. The subject on which the will operated was annihilated by the assignment, and a new power was reserved, which could not be executed by the previous will. At the date of the codicils, the testator had a power of appointment only, and a republication does not make a will operate as the execution of a power created after the date of the will; *Walker v. Armstrong* (*a*). The Wills Act, 1 Vict. c. 26, does not apply or affect the question.

Mr. *Bird* and Mr. *Lewis*, *contrà*. We subscribe to the proposition of law, that a charge which has been revoked cannot be revived by a republication of the will; *Powys v. Mansfield* (*b*). But here the term "revoked" is misapplied; there has been an "ademption" but no "revocation," and the ademption applies to the devise of the leasehold and not to the charge of the annuities. The distinction between revocation and ademption is very important. A revocation takes the words of gift out of a will altogether; but an ademption leaves the words, while the subject of the gift is taken out, and the bequest

(*a*) 21 *Beav.* 284.

(*b*) 3 *MyL. & Cr.* 359.

bequest will still operate on the old subject of the gift, if it be replaced or re-acquired. If a will, containing a devise of the residuary estate to *A.* be revoked by a subsequent codicil, and afterwards new estates are purchased and the will is republished, nothing passes to *A.*; but the result would be different, if, instead of a revocation, there should be an ademption only.

The next question is, how far this settlement operated as an ademption. The authorities shew, that it might have adeemed the bequest and the charge, or the bequest and not the charge.

In *Wigg v. Wigg* (*a*) there was a devise to *A.*, on condition that he paid 90*l.* to *B.* *A.* died in the testator's life, whereby the devise lapsed, yet it was held that *B.*'s charge remained as against the heir at law. In *Hills v. Wirley* (*b*), there was a gift to *A.* of household goods mentioned in the schedule, *A.* paying the Plaintiff an annuity. There was no schedule; yet it was held, that the annuity did not fail. The "rule is, that as long as the fund itself exists upon which the legacy is charged, though it devolves either upon the heir or executor, yet they take it subject to the charge." In *Oke v. Heath* (*c*) there was an appointment to *A.*, but on condition to pay an annuity to *B.* *A.* died in the lifetime of the testator, but it was held, that the annuity was still payable to the executrix.

Here the settlement of *October*, 1831, has adeemed the bequest of the leasehold and not the charge of the annuities.

The testator has republished his will and ratified and

(*a*) 1 *Atk.* 382.

(*c*) 1 *Ves. sen.* 134.

(*b*) 2 *Atk.* 605.

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and confirmed every thing in it. This republication operates, *per se*, and independently of intention, unless an express intention to the contrary appears; *Goodtitle v. Meredith* (a). The codicil brings down the will to the date of the codicil and makes the will speak as of that date, unless a contrary intention be shewn, and gives effect to every word in the will not expressly revoked. In *Hulme v. Heygate* (b) there was a devise to trustees, and the testator afterwards purchased other estates and devised part of them to trustees. It was held, that the whole of the after-purchased estates passed to them. In *Rowley v. Eyton* (c), the will contained a charge for the payment of debts, and the testator afterwards purchased other estates and devised them. It was held, that the debts were charged on all the estates. In *Williams v. Goodtitle* (d) the testator devised hereditaments to his widow for life, and the will contained a residuary devise to her. He afterwards purchased other estates and devised part of them to his widow for life and made a devise of other part which failed. It was held that the wife took all the estates, and that "the will and codicil were to be considered one instrument made at the date of the codicil."

It is said, that a republication cannot operate as an execution of a power created after the date of the will. We deny this proposition to be law. There is no principle which prevents a will, properly worded, being an execution of a subsequently acquired power. The subject of the bequest, in the present case, is a leasehold, and it is plain, that the bequest of future-acquired leaseholds would pass leaseholds acquired subsequently; so copyholds would pass, though the surrender to the use

(a) 2 *Mau. & Sel.* 5.
 (b) 1 *Mer.* 285.

(c) 2 *Mer.* 128.
 (d) 10 *Barn. & Cr.* 895.

use of the will, by which the power to devise is acquired, be subsequent to the will (*a*). There is no decision that a will cannot operate as the execution of a subsequently created power. *Holmes v. Coghill* (*b*) was the case of the execution of a particular power, and in *Lane v. Wilkins* (*c*) a contrary intention was expressed; but both cases are implied authorities for the validity of the execution of such a power. In *Carte v. Carte* (*d*), there was a devise of leaseholds for life, the lease was afterwards renewed, and the will was subsequently republished, and it was held that the renewed leaseholds passed. *Stillman v. Weedon* (*e*) is an expressed authority for the proposition that a will may operate as an execution of a subsequent acquired power.

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The will refers to the subject of appointment and uses the words "I appoint," "I charge;" the republication brings the operation of the will down to the date of the codicil and constitute them one instrument, and speaking at the date of the codicil, it will pass any new interest, unless a contrary intention be expressed, and the *onus* is on the other side to shew that a contrary intention is expressed; *Hulme v. Heygate* (*f*).

The testator knew the terms of his will, and though he afterwards referred to it, he revoked no part of it, but, on the contrary, ratified and confirmed the whole. Besides there is, in the codicil of the 20th of February, 1832, an expressed intention that the gift of the annuity should have effect, for the testator makes a further provision for the legatee "in addition to the provisions by his will and codicil." As to the objection that there are

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| ( <i>a</i> ) 1 <i>Watkins' Copyholds</i> , 157,<br>167, <i>Coventry's 4th edit.</i> | ( <i>d</i> ) 3 <i>Atk.</i> 173. |
| ( <i>b</i> ) 7 <i>Ves.</i> 499.                                                     | ( <i>e</i> ) 16 <i>Sim.</i> 26. |
| ( <i>c</i> ) 10 <i>East</i> , 241.                                                  | ( <i>f</i> ) 1 <i>Mer.</i> 285. |

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are words of futurity contained in the power, the answer is, that they apply to the time when the will would come into operation, and not to the time of making it.

The Master of the Rolls.

I regret being obliged to come to a conclusion which disappoints the intention of the testator, but I have no doubt as to the decision which I am bound to pronounce.

I assume there was an ademption, and on that assumption, I have no doubt, on principle and on authority, that the power reserved by the deed was not executed. I entertain no doubt that under a general devise of all a man's real estate, where other property is acquired after the date of the will and the testator makes a subsequent codicil, the whole would pass. I admit, also, that where there is a devise of a messuage to A., which is expressly revoked by a codicil, and a subsequent codicil is made republishing the will, this republication will not set up the original devise which has been revoked by the codicil.

If a man devise *Whiteacre* to A. and the residue of his estate to other persons, and he afterwards sells *Whiteacre*, but, subsequently, he repurchases it or it comes to him by devise, and he then republishes his will; upon the question whether A., the specific devisee under the will, takes *Whiteacre*, or whether it passes under the residuary devise, I have no doubt, under the old law, that the specific devisee would not take it. The devise was deemed, and the specific devisee could not take it.

The

The cases of *Wigg v. Wigg* (*a*), *Hills v. Wirley* (*b*) and *Oke v. Heath* (*c*) do not affect this question. They were cases of this description:—Gifts of certain property to *A.*, with benefits carved out of it to other persons; *A.* died and the gift to him having lapsed, the Court held, that the interest of *A.* alone had lapsed, but that the interest carved out of the interest intended for him had not lapsed, and that the consequence was, that the heir or residuary devisee took the property subject to the interest which had been charged upon it.

In the case of *Walker v. Armstrong* (*d*), I had to consider whether a will could operate as the execution of a power not in existence at the date of the will, but with the strongest desire to come to that conclusion and though great injustice was the consequence, I came to the conclusion that it could not so operate.

As to the effect of the republication of this will, in making the will operate as an execution of the power, it is to be observed that the case is not affected by the late statute. The republication was merely of the will then in operation; it might bring under the devise subsequently-acquired property, but it does not execute a power which the will itself does not execute. After the case of *Holmes v. Coghill* (*e*), it is too late to argue the contrary. There were peculiar circumstances in the other cases, and *Stillman v. Weedon* (*f*) proceeds on the late statute, which has no application to this case.

I am of opinion that the only thing I have to consider is, whether the settlement operated as an ademption.

(*a*) 1 *Atk.* 382.

(*d*) 21 *Beav.* 284.

(*b*) 2 *Atk.* 605.

(*e*) 7 *Ves.* 499.

(*c*) 1 *Ves. sen.* 134.

(*f*) 16 *Simp.* 26.

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tion. The testator, by his will, gave the leaseholds to trustees absolutely on certain trusts, but the trustees were, out of the rents, to pay this annuity of 60*l.* Subsequent to the date of the will, the testator executed a deed, by which these leaseholds were conveyed absolutely to other trustees. It is impossible to say, that this was not an ademption of the bequest. It is true that you might look at the trusts of the deed and they might be such as to give operation to the existing will, as if the testator had conveyed them to trustees on the trusts expressed in his will or on such trusts as should be found in his will at his death: he however did nothing of the sort, but gave the absolute interest in these leaseholds to trustees on trusts in favour of his niece and family. The ademption was then complete. A power was reserved to the settlor to carve out of the leaseholds, annuities in favour of the persons to whom he had given annuities by his will. If the settlor had died immediately afterwards, could it be said that the annuities were subsisting? One of the trusts of the settlement is to hold subject to a power to appoint annuities to particular persons. Has he executed this power? He has confirmed the will by a subsequent codicil, but he has confirmed it as altered by the ademption of the particular property, which is no longer his own, but is vested absolutely in trustees on the trusts of the deed. It is impossible to say that the will which is confirmed is other than the will as it then existed.

I am of opinion, that in the events which have occurred, there has been no execution of the power contained in the deed of *October, 1831.*

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## COWPER v. MANTELL. (No. 2.)

## COOPER v. MANTELL. (No. 2.)

*April 25, 28.*

THE testator, in a codicil, expressed himself as follows:—"And I also further direct and declare, that *it shall and may be lawful* for my said trustees, at any time after my decease, to raise and pay, out of my residuary real and personal estate, any sum or sums of money *not exceeding* in the whole the sum of 600*l.*, to be applied in the purchase or procuration of a church preferment, for the benefit of my nephew, *James Hammond.*"

A testator authorized his trustees to apply any sum, not exceeding 600*l.*, in the purchase of church preferment for *A.* *A.* died before any sum had been so applied. Held, that the gift wholly failed.

*James Hammond* was of age and in Holy Orders, but he died before any part of the 600*l.* had been applied as directed by the will. He left no next of kin, and the question was, whether the 600*l.* fell into the residue or passed to the Crown.

Mr. *Lloyd* and Mr. *Morris* for the Plaintiff, and Mr. *R. Palmer* and Mr. *Osborne* for the other parties, argued, that there was no trust or direct gift, but a mere discretion as to amount and mode of application, and that the trustees not having exercised it, the gift wholly failed, for the Court had now no means of carrying it into execution. They referred to *Bennett v. Honywood* (*a*), and *Fordyce v. Bridges* (*b*).

Mr. *Wickens* for the *Attorney-General*. The legatee was entitled to the legacy of 600*l.*, and might have come a year

(*a*) *Ambler*, 708.(*b*) 10 *Beav.* 90, and 2 *Phillips*, 497.

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a year after the death of the testator, and required payment, without reference to its application to church preferment, for the gift was merely intended for his benefit, and the discretion of the trustee only applied to the mode of effecting the purpose. The case is precisely analogous to those, where a bequest has been made for the purpose of apprenticing a legatee. There the Court has directed payment of the legacy, although the legatee has not and could not be apprenticed; *Barlow v. Grant* (a); *Nevill v. Noel* (b); *Jones* (c). Even where there is a discretion which has not been exercised, the Court will not allow the gift to fail on that account, but directs payment equally between the legatees, as in *Brown v. Higgs* (d) and *Burrough v. Philcox* (e). The expression here used, "it shall and may be lawful," is as imperative as that employed in *Brown v. Higgs*, where the testator merely "authorized and empowered."

Mr. Lloyd in reply. No definite sum is here given. The amount is left to the discretion of the trustees; but it is not to exceed 600*l.* If the trustees had laid out 500*l.* only, the bequest would have been satisfied. There is therefore a discretion as to the amount, which this Court cannot exercise.

The MASTER of the ROLLS reserved judgment.

April 28.

The MASTER of the ROLLS.

The question on which I reserved my judgment

8 Ves. 561, affirmed  
of Lords, 2 Sug. P.

as to the proper construction to be put on a bequest which is to this effect—[*His Honor read it*]. *James Hammond* died without heirs or next of kin, and the money has never been raised, but if he became entitled to the 600*l.* in his lifetime, it now belongs to the Crown.

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The question therefore is, whether *James Hammond* was entitled to this sum independent of the purpose mentioned in the will; that is, whether this was simply a bequest for his own benefit. In these cases there are contradictory analogies, which it is necessary to reconcile; and which branch into the distinction which exists between powers and trusts. The case is the same as if *James Hammond* was himself asking for the payment of this legacy. On the one hand it is argued, that the case is similar to those where a legacy is given to a person for a particular purpose, which fails, and yet he has been held entitled to the legacy. On the other side it is said, that no legacy is here given, that nothing except a discretion is confided in trustees, which not having been exercised, the legacy fails altogether. There is no case precisely in point; but the general statement in *Roper's Legacies* (a) appears to me to be correct. In *Barlow v. Grant* (b), a legacy of 30*l.* was given to A. to bind him out apprentice; A. died and his legal personal representative was held entitled to the legacy. That case has been followed, and is now undoubted law. The next case is *Nevill v. Nevill* (c), where 500*l.* was given to the son of A. to place him out apprentice; A.'s son was unfit to be placed out, and the legacy was ordered to be paid. It was held that the legacy was intended for his benefit,
and

(a) Vol. 1, p. 646 (4th edit.) (c) 2 Vern. 431.
(b) 1 Vern. 255.

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and although it could not be applied in the manner directed by the testator, yet he was entitled to have it paid to him. In *Barton v. Cooke* (*a*), 100*l.* was directed to be applied for the board and education of *J. B.* till fit to be put out apprentice, and that then the executors should pay the further sum of 100*l.* with him as an apprentice fee. *J. B.* was not put out apprentice; he was held, nevertheless, entitled to the legacy. In *Hammond v. Neame* (*b*), there was a bequest of stock to Mrs. *H. H.*, for the maintenance of her children until they attained twenty-one, and then a direction to transfer the principal amongst the children, and in default of such issue there was a gift over. Mrs. *H. H.* had no child, yet she was held entitled to the dividends. The latter case however depends on that class of cases where legacies are given for the maintenance of children.

On the other hand, there is a class of cases in which no gift arises, because a mere discretion has been given to trustees. Thus, in *Lewis v. Lewis* (*c*), the testator authorized his executors, at any time before *T. L.* should attain the age of twenty-six years, to raise, by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life or other the occasions of *T. L.* as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to *T. L.* absolutely. The executors declining to act, the Court would not give this 600*l.* to *T. L.* before twenty-six, without referring it to the Master to inquire whether *T. L.*'s situation required the 600*l.* or any part thereof to be advanced. The Lord Chancellor in that case observed, "This is not the

(*a*) 5 *Ves.* 462.
(*b*) 1 *Swan.* 35.

(*c*) 1 *Cor.* 162.

the case of a gift by the testator, but a power to others to give, and that seems confined to answer some particular purposes. The proper question to be made in this case is, whether the present situation and circumstances of the Petitioner are such as the testator intended this legacy for." The fact of the legacy having been given "at twenty-six" did not affect the decision of the Lord Chancellor. It appears that there was no gift until twenty-six, unless particular circumstances should arise, under which it should be considered necessary to apply the fund for that purpose.

There are other cases which bear some resemblance to this:—In *Robinson v. Cleator* (*a*), the legatee (a god-son) in effect was tenant for life, with power vested in the trustee to advance him any part of the capital during his lifetime. The Master of the Rolls was of opinion that there was a discretion vested in the trustee, and that the only thing which could be done, on a claim of the god-son to have the whole property as being an absolute interest, was, to direct an inquiry as to the circumstances and situation of the legatee, in order to ascertain whether he required the advancement of any part of the 600*l.* In *Bull v. Vardy* (*b*), the words of the will were these, "I further empower my wife to give away, at her death, 1,000*l.*; 100*l.* of it to *Elizabeth Turner*, 100*l.* to Mrs. *Bennet*, the other 800*l.* to be disposed of by her by will." She made no disposition of any part of the 1,000*l.* *Elizabeth Turner* claimed the 100*l.* on the ground of the gift being in the nature of a trust, but the Court held, that she was entitled to nothing, and that it was a mere power, which had not been executed. *Down v. Worrall* (*c*) was a case of this description. The testator

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(*a*) 15 *Ves.* 526.
(*b*) 1 *Ves. Jun.* 270.

(*c*) 1 *Myl. & K.* 561.

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tator left the residue of his estate to trustees, in trust to settle it or such part of it as they might think fit, either for charitable purposes, at their discretion, or otherwise for the benefit of his sister and her children. As to part, the trustees had made no appointment, and the Court held, that it did not fall into the residue, but went to the next of kin as undisposed of. These cases have a close analogy to the present. *Brown v. Higgs* (*a*), and *Burrough v. Philcox* (*b*), decide, that where a sum of money is directed to be divided amongst a class of persons, in such proportions as trustees shall think fit, and they do not exercise the discretion, the Court will hold it to be a trust and divide the fund equally. But in those last cases, the subject of the gift and the objects or *cestuis que trust* were ascertained, and the only thing to be done was to regulate the division ; and as the trustees had not exercised their discretion, and as this Court could not exercise it, the fund was divided equally between the objects. But here the question is, whether the trust is constituted before the event arises which makes the raising the money necessary. The gift, no doubt, is for the benefit of *James Hammond*; but the question on this will is, whether any trust arises until the occasion occurs which renders the “purchase or procuration of a church preferment” for his benefit desirable?

I am clearly of opinion, that if this had been a gift of 600*l.* to *James Hammond*, for the purpose of purchasing him church preferment, it would be a trust for him, and that he would take it ; but if the amount to be raised for church preferment, and the mode of its application is to be solely at the discretion and option of the trustees, the case would seem to fall within the other class of authorities,

(*a*) 8 *Ves.* 561.

(*b*) 5 *Myl. & Cr.* 73.

ties, and the question really is, to which of those two classes the case belongs. It was contended by Mr. *Wickens*, that the discretion extends only to the mode of raising the 600*l.* The other side say, that a discretion was given to the trustees both as to the amount of money to be raised, and as to the time and occasion of raising it; in other words, that they have a discretion as to the propriety of exercising the power at all. If that be so, the legacy did not arise.

After considering the case fully, I am of opinion that a discretion is vested in the trustees as to the amount of the legacy, and as to the mode and occasion of raising it; and that this is not a legacy which *James Hammond* himself could have claimed by saying, "I do not intend to go into the church—pay me the legacy." This is a power to the trustees to raise a sum, not exceeding 600*l.*, for a particular purpose, and a discretion is reposed in them, both as to the propriety of raising the money, and as to the amount.

This being the case, I am of opinion that *James Hammond* could not himself have required payment of the sum of money, and therefore, that it falls into the residue.

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*April 22.  
 May 5.*

In February, 1851, a debtor, with a surety, gave to his creditor a bond for payment, by instalments, of the amount of the debt, and the first premium on a policy of assurance, effected by the creditor, in his own name, on the life of the debtor. When the second premium became due, the creditor applied to the surety to pay it, but he insisted on his non-liability and refused, and no application was ever made to the principal debtor. The debt was fully paid in September, 1853, but no assignment of the policy was asked for, and the creditor paid and continued to pay all the premiums except the first. The debtor

THIS was a suit instituted to recover from the Defendant the sum of 200*l.*, received by him from the Pelican Life Assurance Office, in respect of a policy of insurance on the life of *Pattison Drysdale*, deceased.

In the beginning of 1851, *Pattison Drysdale* owed the Defendant 154*l. 9s.*, which sum, together with 16*l. 9s.* (being the expenses of moving some furniture, the amount of the *first premium on a policy of insurance* and law expenses), making the total of 170*l. 18s.*, was secured by a bond dated the 10th of February, 1851, by which *Pattison Drysdale*, and the Plaintiff (his father) became jointly and severally bound to the Defendant in the penal sum of 400*l.*, subject to the recitals and conditions thereafter mentioned. The bond recited that *Pattison Drysdale* owed the Defendant 170*l. 18s.*; that *Pattison Drysdale* had requested Defendant to accept payment by instalments, which he had agreed to do, on having the payment thereof with interest secured by the joint and several bond of the Plaintiff and *Pattison Drysdale*; and that the Plaintiff had agreed to join in the bond, subject to the condition thereafter expressed. This condition was expressed to be, that if *Pattison Drysdale*, his heirs, executors and administrators, should pay 20*l.* on the 29th of March, 1851, and so on, a like sum of 20*l.* quarterly, until the whole was paid, and also interest at five per cent. per annum,

having died in June, 1854: Held, by the Master of the Rolls, that the debtors had abandoned the policy, and that not being liable to repay to the creditor the premiums paid by him, they were not entitled to the produce of the policy; but the decision was reversed by the Lords Justices.

**annum, on the same days, on the amount remaining unpaid, the bond should be void.**

The bond was delivered to the Defendant, and the instalments were regularly paid ; the last instalment, discharging all that then remained due on the bond, was paid on the 20th *September*, 1853.

At the time when the bond was executed, or shortly after, the Defendant effected, in his own name, an insurance on the life of *Pattison Drysdale*, in the *Pelican Life Assurance Company*, for the sum of 200*l.* The first premium advanced by the Defendant for the purpose of effecting this policy was secured by the bond and was duly repaid to him. The policy was a general policy on the life of the assured, not specified to last only till the debt was paid, or for two or three years ; had it been a policy of the latter description, a smaller premium would have been necessary in the first instance.

When the second premium became due, in *February*, 1852, the Defendant paid it and called on the Plaintiff to repay him the amount ; this the Plaintiff declined to do, but the Defendant did not appear to have made any application to the son, *Pattison Drysdale*, either to advance the money necessary for that purpose, or to repay him his advance.

When the third premium became due, the Defendant paid that also, without making any application to either the Plaintiff or his son, *Pattison Drysdale*, to do so. In *January*, 1854, the son was lost on the coast of *Ireland*, having embarked on board a vessel bound to

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Australia. On application for payment to the Pelican Assurance Office, they at first declared that the policy was void, because notice of the assured's intention to leave the country had not been given, nor payment made of the additional premium arising from that circumstance; but ultimately, on the additional premium being paid, the office paid the amount secured by the policy.

These were all the facts on which the Plaintiff originally claimed the amount so secured, and by his bill, he claimed partly on the ground that, as one of the obligees in the bond, he was entitled to be repaid what he had paid or advanced for the benefit of his son; but at the hearing, he principally claimed the proceeds of the policy, as the legal personal representative of his son, to whose estate he has taken out letters of administration.

The question under these circumstances was, to whom did the policy and the benefit thereby secured belong, on the death of *Pattison Drysdale*.

Mr. R. Palmer and Mr. Tripp, for the Plaintiff, contended, that as administrator of the estate of his son, he was entitled to the policy. The first premium was duly paid upon it by the Plaintiff or his son, having been included in the bond, and the son had never been applied to for payment of the other two, though the father had for the second. That every thing due upon the bond, both principal and interest, having been duly paid, the Defendant had no right whatever to retain the policy for his own use. That the policy was for the whole life and not for a year, and that there had been no renewal of the policy, but a continuance.

They cited *Morland v. Isaac* (a); *West v. Reid* (b) 1  
129.

(b) 2 Hare, 249.

*Lea v. Hinton* (a); *Ex parte Andrews* (b); *Clack v. Holland* (c); *Dalby v. The India and London Life Assurance Company* (d); *Godsall v. Boldero* (e).

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Mr. *Roupell* and Mr. *Wickens*, for the Defendant, contended, first, that the agreement was to insure for a year, and secondly, that the policy having been abandoned by the Plaintiff and his son, the Defendant was fully entitled to keep it up for his own benefit, and that the Defendant having insured the risk out of his own moneys, without any right to recover the premiums from the debtors, he was entitled to the proceeds of the policy of which he was the purchaser.

They also referred to *Morland v. Isaac* (f).

Mr. *Tripp* in reply.

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

May 5.

This is a suit instituted to recover from the Defendant the sum of 200*l.*, being the amount received by him from the Pelican Life Assurance Office, secured on the life of *Pattison Drysdale*, deceased. The facts are these—[*His Honor stated them*]. The question is, in these circumstances, to whom did the policy and the benefit thereby secured belong, on the death of *Pattison Drysdale*. That the policy was originally the property of *Pattison Drysdale*, subject to any right which the

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| (a) 19 <i>Beav.</i> 324.                     | (d) 15 C. B. 365.        |
| (b) 1 <i>Madd.</i> 573; 2 <i>Rose</i> , 410. | (c) 9 <i>East</i> , 72.  |
| (c) 19 <i>Beav.</i> 262.                     | (f) 20 <i>Beav.</i> 389. |

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the Defendant might have to make it available for the payment of what might be due to him on the transaction above mentioned, I do not doubt. On payment of the last instalment, the Plaintiff or his son, could have required the Defendant to assign the policy on payment of the sum due to him for the second and third premiums paid by him. That the policy was originally effected to secure the debt to the Defendant is I think plain, and on payment of that debt the Plaintiff, or his son, was entitled to the benefit of it; for this was not the case of a creditor who effects an assurance on the life of his debtor without the privity or concurrence of the debtor. Here, undoubtedly, the policy was originally effected by the creditor as part of the arrangement between them when the bond was given; the first premium was secured and ultimately paid by the Plaintiff, or his son. I am, therefore, of opinion that originally *Pattison Drysdale*, on payment of what was due from him to the Defendant, was entitled to the benefit of this policy, and might have required it to be assigned to him.

But then the question arises, was this policy repudiated by the Plaintiff and by his son, and if so, was the Defendant entitled to keep it on foot for his own benefit, and entitled to retain it accordingly. I am of opinion that the Plaintiff, in his character of creditor of the son, did abandon all benefit in this policy, because in *February*, 1852, when applied to to repay to the Defendant the amount of the second premium then due, he declined to do so, insisting that he was not bound to do more than fulfil the conditions of the bond, which answer was acquiesced in by the Defendant, who made no further claim against him in respect of such premiums. .

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The next question, which is the only one of any difficulty, then arises, which is, whether the Plaintiff, as legal personal representative of his son *Pattison Drysdale*, is entitled to the amount of the insurance, and that depends upon whether the son, in his lifetime, did abandon this policy. Express abandonment or repudiation of this policy by any declaration or active step is not alleged. Undoubtedly there was none; the only question is, whether the absence of any acts on the part of *Pattison Drysdale* to keep it on foot must be treated as an abandonment or relinquishment of all interest in it on his part. Two annual premiums became due after the first, while he was alive and in this country; he took no step to pay them, or to get them paid; it is true that no application was made to him for this purpose, but the Defendant was not considered, either by himself or by *Pattison Drysdale*, as his agent, for the purpose of keeping this alive, nor could the Defendant have maintained an action against *Pattison Drysdale* to compel him to repay to the Defendant the amount expended by him in keeping the policy alive. *Pattison Drysdale* ought also to have given notice to the Assurance Company of his going to *Australia*, and to have paid additional premium if he intended to keep the policy on foot.

I cannot, in this state of things, come to the conclusion that *Pattison Drysdale*, or his estate, is entitled to the benefit of this policy. The test to be applied to this case for the purpose of determining this question is, in my opinion, that on which I founded my decision in the case of *Morland v. Isaac* (a). That was the case of an army outfitter who had supplied an officer with goods on credit; he afterwards effected, in his

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(a) 20 *Beav.* 389.

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own name, a policy on the life of the officer, who attended at the office to enable this to be done, and who was charged with the premiums which became due, and items of charge for the payments in respect thereof were introduced into the several accounts delivered to him, and which were never objected to. The debtor died without having paid the bill due to the creditor and insurer or the premiums so charged; and I held, that his representatives were entitled to the produce of the policy after paying the debt and the premiums; and the ground on which I proceeded was this:—that as the debtor never objected to the charge made against him of the sums advanced for the payment of the premiums, he must be held to have assented to his liability to repay the creditor these sums, and consequently, that if the debtor in his lifetime had been sued by the creditor for sums expended in payment of these premiums, the action could not successfully have been resisted, and that his liability to pay the premiums made them a payment on his behalf, and by the creditor as his agent, although, by arrangement between them, it was to secure his own debt.

But on this principle, was the Defendant the agent of the son, *Pattison Drysdale*, for this purpose? Could the Defendant have successfully sued *Pattison Drysdale*, in his lifetime, for the recovery of the sums paid by him for premiums on this policy? I see no ground for contending that he could. *Pattison Drysdale* might have said, as the father did, “the policy was effected in substance to secure you against loss; I consented to pay the first premium for this purpose, but no more.” No claim was made by the Defendant against the son, and no attempt was made by the son to claim the policy. If the right to the policy existed in the son, how long did this right remain on the one hand,

hand, and the corresponding liability to pay the money advanced for the premiums on the other; if the Defendant had paid the premiums for twenty-years, could it have been alleged that the son, *Pattison Drysdale*, would have been liable to repay them? and if not, can he, or rather those claiming under him (for his representatives must stand exactly in his place), say, that he was to have the option to take the policy if beneficial, but to reject it if onerous? It is no doubt true, that when the debt due from *Pattison Drysdale* was paid, the Defendant had no longer any insurable interest in the life of the son, and that upon the principle of *God-sall v. Boldero* (a), the risk being over, the *Pelican Assurance Company* might have refused to pay the policy, but this does not, in my opinion, vary the rights of the other parties. When originally effected, it was a good policy, as the Defendant had then an insurable interest in the life of the assured. But when, on payment of the debt due to the Plaintiff by *Pattison Drysdale*, or by his father and co-obligor, no assignment of the policy was asked for by either of them, so far as they were concerned it was permitted to drop; and the question, whether it could be legally continued by the Defendant, although one which might have been raised by the Assurance Company, is one in which the Plaintiff and his son ceased to have any interest.

*West v. Reid* (b), which was cited for the purpose of shewing that the conduct of *Pattison Drysdale* did not amount to any abandonment of this policy, appears to me to be distinguishable from the present case. In that case, the debtor effected a policy in his own name, on his own life; he assigned that policy to  
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(a) 9 *East*, 72.

(b) 2 *Hare*, 249.

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one of a firm of solicitors of the creditor, as a trustee to secure a debt owing to that creditor. The benefit of the policy was afterwards assigned to another person, also a client of the same firm; the notices to pay premiums were all sent to that firm of solicitors, and they paid the premiums continuously, and charged the amount to this client. Ten years after the original transaction, the original debtor became bankrupt; the assignees took no step respecting the policy, and declined to interfere respecting it, and the solicitors of the creditor or his executors continued for thirteen years more to pay the premiums; then the debtor died, and the policy became payable. There was no question but that the creditor was entitled to be paid his principal and interest, and also the premiums paid by him and the interest thereon, but beyond that, the Vice-Chancellor held, that the money thereby secured belonged to the assignees, and that their conduct did not amount to any waiver or abandonment of their right. But in that case, it is to be observed, that the policy was originally effected in the name of the debtor, and by him assigned to secure a debt. Subject to the payment of that debt it belonged to and was his property, and his executors alone could receive the money after his death, no notice of the assignment having been given to the office. The creditor who paid the premiums was entitled to charge, and did charge, these payments against the debtor, and the debt was unpaid at the death of the assured; but here, the policy was originally effected in the name of the creditor to secure the debt due to him, and except the payment of the first premium, no payment was made by or could be charged against the debtor. Assuming that, on payment of the debt, the debtor might have required it to be assigned to him on payment of the premiums, it is quite different where he neglects to do

do so, takes no step to keep it alive, and incurs no liability in that respect.

The Vice-Chancellor, in *West v. Reid*, had not occasion to consider what would have been the case, if the creditor had been paid off in the life of the debtor who had neglected to ask for any release of the policy, and had neglected to keep it on foot. Possibly the length of time during which the premiums were paid by the assured, as the creditor on payment became a stranger to the policy, might affect the merits of the case, and each case must be tried on its own grounds. But in this case, my opinion is, that the policy was continued by the Defendant at his own risk and for his own benefit; and that as he could not compel any one to repay to him the sums advanced in respect of the premiums, so no one can now compel him to repay the amount thereby secured, which has been paid to him by the Assurance Company.

The result is, that the bill fails, and must be dismissed.

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Note.—Reversed by the Lords Justices, on the 19th of July, 1856.

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*April 4, 5,
11, 14.*

*A. and B.
were trustees.
A deed was
prepared ap-
pointing C. a
new trustee in
the place of B.
It was exe-
cuted by C.,
but not by the
other parties,
so that the ap-
pointment was
invalid. At
the same time,
the trust fund
was transferred
by A. and B.
to A. and C.
Afterwards
A. and C.
authorized the
husband of the
tenant for life
to receive the
fund, and it
was lost.
Held, that
both C., (who
had not been
appointed a
trustee, though
she had acted
as such), and
B. were liable
for the loss.*

PEARCE v. PEARCE.

UNDER the marriage settlement of Mr. *William Pearce* and his wife, dated in 1846, 2,000*l.* Consols were invested in the names of *Samuel Lepine* and *John Pearce*, to be held by them on the usual trusts for *Mrs. Pearce* for life, without power of anticipation, &c. &c. The deed contained a power to the trustees, at the request in writing of *Mrs. Pearce*, to invest the 2,000*l.* Consols in fee simple lands or on leaseholds. And there was a power to the trustees, at the request in writing of *Mrs. Pearce*, to appoint new trustees.

Mrs. Pearce became offended with the trustee *John Pearce*, and requested him to resign, which he consented to do, and *Harriet Williams*, a widow lady, was, after considerable reluctance on her part, prevailed upon to become a trustee in his place.

On the 9th of *February*, 1849, *John Pearce*, at *Mrs. Pearce's* request, and believing that *Mrs. Williams* would be appointed a trustee, executed a power of attorney to transfer the stock to *Lepine* and *Mrs. Williams*, and it was transferred to them accordingly on the 9th of *February* and before any deed of appointment of new trustees had been executed. A deed was prepared and engrossed for the purpose of appointing *Mrs. Williams* a new trustee, which purported to be made between *Mrs. Pearce* of the first part, *Lepine* and *John Pearce* of the second part, *Mrs. Williams* of the third part, and a trustee of the fourth part. This deed was executed by *Mrs. Pearce* and by *Mrs. Williams*, but was never executed

executed by any of the other parties; so that, in fact, *Mrs. Williams* was never duly appointed a trustee.

Subsequently, at the request of *William* and *Mrs. Pearce*, *Lepine* and *Mrs. Williams* executed a power of attorney, authorizing *William Pearce* to sell out the stock, for the alleged purpose of investment in leaseholds. The stock was sold and the money invested in various mortgages, &c., and was ultimately lost. *Lepine* died in 1849, and *William Pearce*, being insolvent, *Mrs. Pearce* filed her bill against *John Pearce* and *Harriet Williams* to make them liable for the 2,000*l.*

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Mrs. Williams, by her answer, stated, that *Mrs. Pearce* told her that *John Pearce* had been disrespectful to her, and she wished therefore to have another trustee in his place; that *William Pearce* told her, that executing the power of attorney was a mere matter of form; that she really knew nothing at all about what the meaning of it was; that she thought *Mrs. Pearce* had a right to do and could do with her own money precisely as she pleased, and that the trustees were only appointed to prevent Mr. *Pearce* dealing with the fund without her consent; and that finding that *Mrs. Pearce* knew of the various matters, and expressed herself satisfied therewith, she executed such deeds as *Mrs. Pearce* asked her to execute.

Mr. Lloyd and *Mr. W. Foster*, for the Plaintiff, contended that a breach of trust had been committed, and that the Plaintiff's interest was in no way liable to make it good; *Kellaway v. Johnson* (a).

Mr. R. Palmer and *Mr. Southgate*, for *Lane*, the representative

(a) 5 *Barr.* 319.

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representative of Mrs. *Williams*, who had died since the institution of the suit, contended that Mrs. *Williams* was not a trustee, and that a fraud had been practised upon her. They cited *Walker v. Symonds* (*a*); *Derbshire v. Home* (*b*); *Vaughan v. Vanderstegen* (*c*).

*Mr. Hobhouse*, for *John Pearce*.

*The MASTER of the ROLLS.*

I will hear Mr. *Lloyd* in reply as to the liability of Mrs. *Williams*, but as to *John Pearce*, I am quite clear that he is liable.

Mr. *Lloyd*, in reply, cited *Stikeman v. Dawson* (*d*); *Jackson v. Hobhouse* (*e*).

*The MASTER of the ROLLS* reserved judgment.

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*April 14.*

*The MASTER of the ROLLS.*

At the hearing of this case I expressed my opinion, I regret to say (for I cannot but feel that this is a very hard case), that Mr. *John Pearce* committed a breach of trust, by executing the power of attorney for the transfer of the trust fund to a person who was not then a trustee, although he had a firm belief that she would be appointed a trustee; for, in fact, the deed appointing Mrs. *Williams* was never executed by the trustees.

Mrs. *Williams* evidently accepted the trust, and, I regret also to say, I have come to the conclusion, that

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| ( <i>a</i> ) 3 <i>Swanst.</i> 82, n.                  | ( <i>c</i> ) 2 <i>Drew.</i> 363.          |
| ( <i>b</i> ) 3 <i>De G., M. &amp; G.</i> 102,<br>113. | ( <i>d</i> ) 1 <i>De G. &amp; Sm.</i> 90. |
|                                                       | ( <i>e</i> ) 2 <i>Mer.</i> 483.           |

that her estate must be made liable, even upon her own statement of the case. She consents to become a trustee, though she resisted at first; she really knew nothing at all about the matter; she was an old lady and a widow, and it was evidently out of friendship to the Plaintiff that she consented to become a trustee. She was never regularly appointed trustee, but she acted as such, and may be said to have been in the nature of a trustee *de son tort*, if that expression may be borrowed from the case of an executor; and in that character she can only be answerable for the monies she actually received. But this money was actually received by her, it was transferred into her name, and it could not have been got out of her name without her consent.

The state of the facts appears to me to be this:—She consented to act as a trustee, the money was paid into her name, she then executed a power of attorney to sell it out, being told by Mr. *William Pearce* that it was a mere matter of form, and she says, that she really knew nothing at all about what the meaning of it was. She says, “I thought the Plaintiff had a right to do and could do with her own money precisely as she pleased, and that the trustees were named only to prevent *William Pearce* dealing with it without her consent. Finding that the Plaintiff knew of the various matters and had expressed herself satisfied therewith, I executed such deeds as she asked me to execute,” and she also executed the power of attorney.

Now, in that state of things, having consented to act as a trustee, she cannot be allowed to say she did not know what the trusts were, or that she thought that the trusts were such, that the Plaintiff had a right to do as she pleased with the money. The way in which I am bound to look at it is this:—How should I treat

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treat it, supposing it had been the case of a professional man, and a lawyer who had been so appointed ? Could I allow him to make such an answer ? It is obvious I could not. Could I allow a man of sense who was not a professional man to make such an answer. In my opinion, it is obvious, I could not. Then can I allow a lady, who had her wits about her, and who was perfectly well competent to perform her duties in society, to make the same answer ? It appears to me that the maxim *ignorantia legis neminem excusat* binds me in this case. If I were not so bound, I should be obliged to inquire, in every particular case, what was the greater or less degree of knowledge, which, having regard to the particular pursuits in life of every person, and the nature of their occupations, they were likely to have in a matter of this description. I am bound to say, that in the absence of fraud, (because I admit that if fraud were proved then a different consideration would arise), this lady having been asked to become trustee, really and sincerely believing, that as a trustee, she had nothing to do but to allow the Plaintiff to deal with her money as she thought fit, is not excused for her allowing the money to be sold out in direct violation of the trusts, which, by accepting, she had undertaken to perform. It is true she was not regularly appointed a trustee, but the money having come into her name, she is, in my opinion, liable to that extent.

I have looked through all the evidence to see if there really was a fraud committed on her, and I find none.

Under these circumstances, the conclusion I have been obliged, with regret, to come to, is this :—That this lady must be held to have acted as a trustee in this matter ; that she is liable therefore for the misapplication  
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of any money which came to her hands ; that this 2,000*l.* did come to her hands, and having been applied by her in a manner not in accordance with the trusts, her estate must be made liable for its loss.

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*In re CHANDLER.*

April 16.

**O**N the marriage, in 1850, of the Petitioner, Mr. *Best*, with *Frances Charlotte Worsley*, a sum of stock was vested in the names of Mr. *Chandler* (a solicitor) and Mr. *Worsley*, and a settlement was prepared by *Chandler*, by which the trusts of the stock were declared to be for Mrs. *Best* and the children of the marriage, and in default of children, there was a general power of appointment to Mrs. *Best*, and in default of appointment the fund was to go as if Mrs. *Best* had died intestate and unmarried. The settlement also contained a power to raise 500*l.* out of the trust monies and lend it to Mr. *Best*, and there was a clause empowering a solicitor trustee to make professional charges.

*A. B.*, a solicitor, who was the only person who acted professionally in the trust, induced his co-trustee, who was his client, improperly to sell out the trust fund, which was received by *A. B.* and applied to his own use. On the application of one of the *cestuis que trust*, the solicitor was struck off the rolls.

**I**n April, 1851, the trustees raised the 500*l.* for Mr. *Best*, and took his bond to secure it, *Chandler* acting as solicitor in the matter and being paid as such by Mr. *Best*.

**I**n October, 1851, Mrs. *Best* died without issue, having, by her will, given her husband a life estate, but made no further appointment. Thereupon *Chandler*, in right of his wife, who was a sister of Mrs. *Best*, became entitled to one-third of the trust fund, in reversion, after the death of Mr. *Best*.

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In *December*, 1852, *Chandler* prevailed upon Mr. *Worsley*, his co-trustee, who was his client and reposed confidence in him, to join in executing a power of attorney to sell out the stock, and to allow Mr. *Chandler* to place the proceeds to his own account at his bankers. This being done, *Chandler* applied the money to his own use, but continued to pay the dividends to Mr. *Best* down to *October*, 1855.

In *February*, 1856, it became known that *Chandler*, who was insolvent, had misapplied the fund, and Mr. *Best* now presented a petition to have him struck off the rolls.

By his affidavit, *Chandler* denied he had ever acted as the Petitioner's solicitor, or as Mrs. *Best*'s solicitor after her marriage; and he stated, that as one of the trustees, he had always acted in the management of the trust fund without making professional charges against the fund or against Mr. *Best* or Mr. *Worsley* in respect thereof, except in the matter of the bond by the former; that his wife being interested in the trust fund, he thought it would be of advantage to the trust estate, as well as to her, to realize the stock then at the price of 101*1/2*l., and to place out the proceeds upon another security, and that he kept an entry of the proceeds in his ledger, under the name of "The trustees under Mr. and Mrs. *Best*'s marriage settlement."

It did not appear that any other solicitor had been employed in relation to the trust fund, and the Petitioner's evidence went to show, that no other solicitor had been engaged in the trust, except *Chandler*. It did not appear that *Chandler* had any investment in view at the time the stock was sold out.

Mr.

Mr. Shapter, for the Petitioner.

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Mr. R. Palmer and Mr. F. J. Wood, for Chandler.
This application to the summary jurisdiction of the Court against Mr. Chandler, as an officer of the Court, ought not to have been made, and there is no justification for it under the circumstances. The act done by him, though constituting a breach of trust, was done in his character of trustee and not of solicitor, and with no fraudulent intent. Mr. Chandler had an interest in the fund and naturally wished to improve it, and when he had the money placed to his account at his banker's, he possessed a large amount of property, and thought the trust fund quite safe; but, unfortunately, it turned out otherwise. He did not intend to wrong any one, nor was there any concealment, for the money was duly entered in his own books to the proper account. He, no doubt, charged for preparing the marriage settlement and the bond, but that was all, and there is no reason to say, that he was the solicitor of the trust as well as trustee. He is not therefore amenable to the summary jurisdiction of the Court in respect of a matter not relating to his professional conduct.

The Master of the Rolls.

These cases are very painful, but the Court has no option as to the course to be taken.

It is said that Chandler was not the solicitor of the trust, and that he had not made any professional charges against the estate. But he was a trustee, and so far as the services of a solicitor were required, he had acted as such, or, at least, there does not appear to have been any other solicitor employed. He knew it was a breach of trust to sell out the stock; he knew he

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could not do so without the consent of his co-trustee ; and knowing this, he induced his co-trustee to join in executing the power of attorney to sell out, and that obviously for his own purposes, he having, at the time, no security or investment in view to justify him in keeping the money at his banker's for that purpose, but he kept it there and applied it to his own use. This is a course of conduct which solicitors are bound to keep themselves free from ; they are placed in a position of a high trust, and happily it is very rare that the Court is called upon to bring them to account in this manner. They are commonly appointed trustees from the fact that their being solicitors of this Court gives them the stamp of trustworthiness, and marks them as persons in whom confidence may, without hesitation, be reposed.

I cannot therefore allow this gentleman, who has shewn his unfitness for the office he holds, to remain in a situation to do injury to others, who might be induced to trust him ; and therefore, though there is this extenuating circumstance in his favour, that the fund does not wholly belong to other persons, I must strike him off the rolls of the Court.

NOTE.—See *Goodwin v. Gossell*, 2 Coll. 462; *In re Martin*, 6 Beav. 337; *Anon.* 2 Atk. 173; and *In re Hall*, V. C. Stuart, June 27, 1856.

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CANDLER v. TILLETT.

Dec. 8, 10, 17.

THE testator, a farmer, was possessed of considerable property, consisting chiefly of notes of hand, mortgages and securities for money. Amongst them, was a mortgage for 1,600*l.*, executed to him by *John Nott*, and an equitable mortgage by deposit, for 1,800*l.*, evidenced by a memorandum, and made to the testator by *Tillett*, his confidential solicitor. All the testator's securities were kept in a box, which the testator himself allowed to remain in *Tillett's* possession.

By his will, the testator gave his residuary estate to be divided amongst his nephews and nieces, and he appointed *Candler* and *Tillett* his executors. The testator died on the 23rd of *October*, 1849, and about a week afterwards, the executors met at *Tillett's* office and examined the box, when *Tillett* made out and signed a list or schedule of the securities, which he delivered to *Candler*, together with the key of the box, but *Tillett* retained the box itself in his possession as before. On the 1st of *January*, 1850, *Tillett* sent a gig with the box to *Candler*, who lived at a distance of about five miles,

ment, though he was very active in recovering a debt due to himself personally from *T.* *T.* deposited his title deeds with another person as a security for fresh advances, and the testator's debt was lost. Held, that *C.* was liable for the loss.

A testator placed his securities in the custody of *T.* his confidential solicitor. By his will, he appointed *T.* and *C.* his executors. *T.* made out a list of such securities, which he signed and retained in a box, but he gave the key to *C.* Afterwards, *T.* sent the box to *C.*, requesting him to take out a mortgage security and send it to him for the purposes of an intended transfer. *C.*, having no reason to suspect *T.*, complied, and the mortgage money was received by *T.* alone and misappropriated by him. Held, that his co-executor (*C.*) was not liable, it appearing from the evidence that the solicitor had a second key of the box, and could and probably did open the box himself.

If one executor does an act which enables his co-executor to obtain sole possession of money belonging to the estate, and which but for that act, he could not have obtained possession of, and the money is afterwards misappropriated by such co-executor, both are liable for the loss.

C., who knew that *T.*, his co-executor, owed money to the testator on an equitable mortgage, allowed him to keep the title deeds in his sole possession, taking no steps to compel pay-

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miles, and requested him to open it and take out the papers relating to *Nott's* mortgage security for 1,600*l.*, and send them to him by the messenger. *Candler* accordingly opened the box and delivered the papers. The Court came to the conclusion, that besides the key in *Candler's* possession, *Tillett* had another which fitted the lock. *Nott's* mortgage money, unknown to *Candler*, was paid to *Tillett* on the 1st of *January*, 1850, who, unknown to his co-executor, applied it to his own use, and it was lost. It was held in another suit, that the payment of the mortgage money to *Tillett*, as one of the executors, was a valid payment as regarded the mortgagor; and in a suit of *Brewster v. Tillett* a decree was made against the two executors for a re-conveyance of the estate. Repeated applications were made by *Candler* to *Tillett* respecting *Nott's* mortgage, his suspicions became aroused by the evasive conduct of *Tillett*, and ultimately, on the 1st of *July*, 1850, *Candler* discovered, that the 1,600*l.* had been paid to *Tillett* in *January*, 1850. *Candler* immediately took proceedings, by instituting a suit against *Tillett* in equity in *July*, 1850. He obtained an order against him for payment of the 1,600*l.* into Court, which order he duly prosecuted, but without effect, for *Tillett* took the benefit of the Insolvent Act and was afterwards transported for perjury.

Next, with respect to the equitable mortgage for 1,800*l.*, due from *Tillett* himself to the testator, the following statement is necessary:—The title deeds of this property remained in *Tillett's* possession; *Candler*, knowing this, took no steps to secure them or to recover the debt, though he was told, on one occasion, by a solicitor, that it was a most irregular proceeding. *Tillett*, having the sole control of his own title deeds, deposited them with his bankers to secure an advance
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of 800*l.* They had no notice of the testator's equitable mortgage, and having afterwards acquired the legal estate, they obtained priority over the testator's debt, part of which was thereby lost.

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Contrasted with this neglect, on the part of *Candler*, to obtain payment of the debt due to the testator's estate, it appeared that *Tillett* was also indebted to *Candler* personally in a sum of 600*l.*, and that immediately after he had discovered, in *July*, 1850, that *Tillett* had received the 1,600*l.* on *Nott's* mortgage, he brought an action at law against *Tillett* for the recovery of the 600*l.* due to himself: this he prosecuted effectively and obtained payment about the 1st of *September*, 1850.

There were some suspicious circumstances, tending to show that the money advanced by the bankers had been applied in payment of *Tillett's* debt to *Candler*.

The question now was, whether *Candler* was liable to make good the losses in respect either of the two sums of 1,600*l.* and 1,800*l.* The Chief Clerk found him liable for *Tillett's* debt, but not for *Nott's*. *Candler* objected to the Chief Clerk's certificate as to the latter, and the parties interested under the will objected to it as to the former sum.

*Mr. R. Palmer* and *Mr. Haig*, for the persons entitled under the will, contended, that *Candler* was liable both for the 1,600*l.* and 1,800*l.* That *Candler*, giving to *Tillett* the possession of the title deeds, had placed the assets under the control of one of several executors, and thus enabled him to obtain payment and misapply the amount received; that with regard to the 1,600*l.*, this act and improper proceeding rendered him

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him liable to the consequent loss; *Clough v. Bond* (*a*); *Wood v. Beadell* (*b*).

Secondly, as regarded the 1,800*l.*, that in addition to his leaving the securities in the hands of the debtor, *Candler* had neglected to take proper proceedings against his co-executor to compel payment, which it was his bounden duty to have done; *Styles v. Guy* (*c*); and that his proceedings and their success, in the case of his own private debt, were clear evidence of his neglect in regard to the testator's debt, and of the certainty or possibility of obtaining payment of it, if he had adopted proper proceedings for that purpose.

**Mr. Roupell** and **Mr. Fooks**, for *Candler*. Executors are only responsible for their own acts, and not for the acts of their co-executors, and are liable only for monies which have come to their own hands; *Balchen v. Scott* (*d*); *Westley v. Clarke* (*e*); 2 *Williams on Executors* (*f*). The law grants to each executor the power of acting independently of his co-executors, and unless an executor knowingly allows his co-executor to misapply the assets, and with such knowledge takes no steps to prevent it, he is not answerable for the loss; *Williams v. Nixon* (*g*). Here, immediately on the discovery, *Candler* took active steps against his co-executor; these he prosecuted with the greatest diligence and vigour, and he cannot, therefore, be made responsible for an inevitable failure in obtaining a restitution of the fund.

As to the debt of 1,800*l.* no great delay took place; and in *Garrett v. Noble* (*h*), where a testator had directed

(*a*) 3 *Myl. & Cr.* 490.

(*e*) 1 *Eden*, 357.

(*b*) 3 *Sim.* 273.

(*f*) Page 1124 (1st edit.).

(*c*) 1 *Mac. & Gor.* 422; 1 *Hall & Twells*, 526.

(*g*) 2 *Beav.* 472.

(*d*) 2 *Ves. jun.* 677.

(*h*) 6 *Sim.* 504.

directed his executors, with all convenient speed after his death, to call in and convert into money all his personal estate, and they had continued to trade some years after his death, and ultimately a considerable loss had been sustained ; the Court refused to charge the executors with the loss, as they had acted *bonâ fide*, and according to the best of their judgment.

**Mr. R. Palmer**, in reply.

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*The Master of the Rolls.*

*Dec. 17.*

In this case I think the certificate of the Chief Clerk must be confirmed in both respects.

The first question relates to a sum of 1,600*l.*, paid to *Tillett* by *Brewster*. The case was this :—The testator, Mr. *May*, was mortgagee of *Nott* for 1,600*l.* He died in *October*, 1849, leaving the Plaintiff and the Defendant his executors. *Tillett* was the confidential solicitor, and kept all the securities of the testator. Mr. *Candler*, when the will had been proved, went to the office of Mr. *Tillett*, the securities in the box were examined, and a list of them was made out, and being signed by *Tillett*, was given, with the key of the box, to *Candler*, and the papers remained, as before, in the custody of *Tillett* the confidential solicitor of the testator, who was also one of the executors : the other executor kept the key. The matter remained in this state until the 1st of *January* following, or about two months after the death of the testator. *Tillett* sent a gig with the box to Mr. *Candler*, who lived at a distance of about six miles, with a request that the box should be opened, and the papers taken out relating to this estate, and delivered to the servant for *Tillett*.

What

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55. him liable to the consequent loss; *Exceedingly uncertain*
~ *Wood v. Beadell (b).* evidence before me,

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Secondly, as regarded the two that are pro-
his leaving the securities thought had never existed,
Candler had neglected Tillett containing the enclosure
against his co-exe *also an additional letter from Til-*
was his bounde *instructions what to do, and why he*
and that his *Mr. Candler swears most positively,*
his own p *is confirmed by several members of his family,*
in rega *when I see no reason to doubt, that there was such a*
poss *note, and that it was destroyed in the course of the*
p *On the other hand, it is sworn that these other*
two notes were sent. The purport of Mr. Tillett's note
is not intelligible, unless it refers to some other docu-
ment; and I have come to the conclusion that there
was such note, and that the evidence is correct upon this
subject.

What the contents of the note were it is difficult to ascertain. Mr. Candler declares positively that it was merely a direction to deliver the papers over to Tillett, for the purpose of enabling the party to whom the mortgage was to be transferred to compare the documents with the abstract. If that were so, undoubtedly it would be a perfectly legitimate purpose, for which the deeds might be delivered up. It is, however, a matter worthy of some observation, that the conduct of Candler, subsequently to this event, is not quite in accordance with that view of the subject; he certainly seems to have thought that the money was either paid or about to be paid immediately; for he made repeated inquiries of Tillett in reference to the money, and to know what had been done with it, and whether it was to be paid, and he is put off, from time to time, by Tillett with a series of evasive answers.

I think

I think that the rule of law is this:—If one executor does any act which enables his co-executor to obtain sole possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor, who thus enables his co-executor to obtain possession of the money, is liable to make good the loss. Therefore, if the deeds here had been in the hands of *Candler*, and he had handed them over to *Tillett* for the purpose of receiving the money, and had thereby enabled *Tillett* to obtain money which he could not otherwise have done, I should have charged *Candler* with the loss. From the facts that I have already mentioned, if the case had rested there, it would seem that this was a case of that description. But I am not satisfied by the evidence that this is so. The box was in the possession of *Tillett*; it was placed there by the testator, and the evidence satisfies me that *Tillett* had possession of a key, which, if not the proper one, was one which would open the box, and that he occasionally resorted to it for that purpose, and opened the box with that key. This is positively sworn to by two witnesses. The evidence before me, and the production of the key, which opened the box in my presence in Court, all satisfy me that such was the case. What the purpose and motive of *Tillett's* was in sending to *Candler* to have the box opened I am unable to state. I might guess what the motive was, but there is nothing accurately to shew it. I am of opinion that *Tillett* had the means of acquiring these deeds without *Candler*; and I am of opinion, that if *Candler* had refused, he would have done it exactly in the same way without him, and that he resorted to *Candler* for some purpose or other, possibly to obtain his sanction; but that no refusal of *Candler* would have prevented the transaction occurring exactly as it did occur. The testator

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tator had left these deeds in the possession and power of *Tillett*, and I think that *Candler* did no act which enabled *Tillett* to obtain the money, or which but for that act he could not otherwise have obtained.

He did not take possession of the deeds and keep them, which he might undoubtedly have done when they were brought to him; but I am of opinion that *Candler* cannot be charged, because he did not at this time, when he had no reason to suspect *Tillett*, take away the papers deposited by the testator with his confidential solicitor, and keep them when they were brought to him, instead of returning them to *Tillett*.

That being the view I take of the case, although I cannot say I have arrived at that conclusion without some hesitation, and although the evidence on the subject is obscure, I think I cannot charge *Candler* with the sum of 1,600*l.*

With respect to the other sum of money there really is no question about it. The state of the case is this:—*Tillett* owed the sum of 1,800*l.* to the testator upon a mortgage of his own property. When *Candler* knows this, he takes no steps to get in the money, he allows the securities to remain in the mortgagor's possession, and not only does that, but does it upon more occasions than one; and, notwithstanding a solicitor who was present stated, that it was a most irregular proceeding, he never attempted to acquire the deeds, and took no steps whatever to make the other executor pay the debt due from him to the estate, which it was his peculiar and bounden duty to do, and which the other executor, who was the debtor, would certainly not pay unless compelled. Besides this, he does an act which is as strong as one can well conceive. *Candler*, knowing how insecure

*Tillett*

*Tillett* is, and having good reason to doubt his credit shews how active he thought it necessary to be for the purpose of recovering his own debt from *Tillett*, yet he takes no steps whatever to recover the testator's debt, and even leaves the security for it to remain in the possession of the debtor. He thereby enables him to deposit this security with the bankers, and raise a sum of money upon it, and then he thinks that he is not responsible, when it is clear, that if he had taken active means, he would have prevented any such money being raised, and the debt being lost. There were abundant steps which he could have taken, even if he could not have obtained possession of the security, and there is nothing to show that he might not have obtained possession of the security and have enforced it. It also seems to me the fair inference from that transaction (although I should have come to the same conclusion independently of it), that the money raised from the bank on the security of this property was raised to pay the debt due from *Tillett* to *Candler* personally.

All this shows how different a course of proceeding was adopted by *Candler* to obtain payment of his own debt, from that resorted to in order to obtain payment of the debt due to the testator's estate, which as trustee he was bound to enforce.

The result is, that I am of opinion that the certificate is correct upon both points.

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Devise to trustees and their heirs to preserve contingent remainders, held to pass an estate during the life of the tenant for life only and not in fee.

Whether the rule, that under a gift to one for life, and afterwards to the survivors of a class, the survivorship has reference to the period of enjoyment applies to real estate, *quare.* But held, the question did not arise upon a devise to four, to hold as tenants in common,

**T**HE testator, *Richard Bewley*, by his will, devised his freehold estate at *Sudford* to trustees and their heirs, upon trust for *George Herbert Adams* and *Margaret* his wife during their lives, and from and after their deceases, the testator "gave and devised all the said estate and premises unto and amongst his four granddaughters, (daughters of Mr. and Mrs. *Adams*,) *Harriet*, *Charlotte*, *Margaret* and *Georgiana*, to hold to them as tenants in common and not as joint tenants, during the term of their respective natural lives, with benefit of survivorship, the remainder to the said trustees and their heirs upon trust to support the contingent remainders thereinafter limited of and concerning the said estate and premises, the remainder to the issue male of his said granddaughters the said *Harriet*, *Charlotte*, *Margaret* and *Georgiana*, successively, lawfully to be begotten, and in default of such issue the remainder to his own right heirs for ever."

The

Devise to trustees and their heirs, in trust for *A.* and his wife for their lives, and after the death of the survivor, to testator's four grand-daughters, as tenants in common, during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four grand-daughters successively, remainder to the testator in fee.

Held, that the grand-daughters took for life as tenants in common, with survivorship to the survivors and survivor of them; and that after the death of the last survivor, their issue took several inheritances in tail. Held, also, that the limitation to trustees and their heirs to support contingent remainders was not in fee, so as to make the subsequent remainders equitable and prevent the coalescing of the remainder to the issue with the life estate to the parent, and therefore that the four grand-daughters took estates tail.

Distinction between a devise to several persons as joint tenants and a gift to them as tenants in common, with benefit of survivorship.

The testator died in *September*, 1794, leaving Mr. and Mrs. *Adams* and his four granddaughters surviving. Mr. and Mrs. *Adams* died previous to 1810. Of the testator's four granddaughters, *Harriet* died in 1844, without having been married; *Charlotte* married, and died in 1851, having executed a settlement of her interest under the will, under which the Plaintiffs were trustees, and the Defendant, *Richard C. Borrell*, (her only surviving son,) was tenant for life determinable on his insolvency which had happened.

The two surviving daughters, *Margaret* and *Goriana*, were still living, and the latter had issue.

The Plaintiff was the surviving trustee of the marriage settlement of *Charlotte*, and this suit was instituted to obtain the declaration of the Court as to the rights of the parties under the limitations contained in the will.

Mr. *Lee* and Mr. *Kingdon*, for the Plaintiff. The granddaughters take estates tail; for the remainder to the "issue male" unites with the life estates to the parents; *Roe d. Dodson v. Grew* (*a*). The word "issue" is *nomen collectivum*; *King v. Melling* (*b*); and is a word of limitation; 2 *Jarm. on Wills* (*c*). The rule is different as to personal estate; *Ex parte Wynch* (*d*); *Knight v. Ellis* (*e*); *Forth v. Chapman* (*f*). This construction is made clear by the gift over in default of "such issue;" that is issue male, which shows the testator's intention that the estate should not go over until failure of all issue male. The authorities establish the doctrine, that where an intention is declared that the issue

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(*a*) 2 *Wils.* 322.

(*d*) 5 *De G., M. & G.* 188.

(*b*) 1 *Ventr.* 214, 225.

(*e*) 2 *Bro. C. C.* 570.

(*c*) Page 352 (1st edit.).

(*f*) 1 *P. Wms.* 663.

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to whom the testator has given an express estate for life shall take the estate as long as issue continue, and that it is only to go over on a total failure of such issue, the parents must take an estate tail, for the purpose of carrying the general intent into effect and for the sake of the issue themselves. Therefore, the four granddaughters are tenants in tail, in equal shares as tenants in common, with cross remainders to them in tail; *Woodhouse v. Herrick* (*a*); with an ultimate remainder to the testator's right heirs. The application of the rule in *Shelley's* case (*b*) is not prevented by the interposition of the estate to preserve contingent remainders; *Papillon v. Voice* (*c*). But it will be said, that the limitation to the trustees and their heirs to preserve contingent remainders confers on them the fee, and makes the subsequent remainder to the issue an equitable estate, incapable of uniting with the legal estate for life in the parents. But that is not so, the estate of the trustees will be limited to that which is necessary to accomplish the purposes for which it is interposed, and will be construed an estate *pur autre vie* only; *Beaumont v. Marquis of Salisbury* (*d*); *Colmore v. Tyndall* (*e*); *Venables v. Morris* (*f*); and the estate of the trustees will cease when the objects have been accomplished; *Heardson v. Williamson* (*g*).

Next, it will be objected that the words "with benefit of survivorship," have reference to the period of enjoyment. But this doctrine is inconsistent with the earlier cases and the survivorship, if referable to any event, relates to the death of the testator. Lord *Bindon v. Earl*

- (*a*) 1 *Kay & J.* 352.  
 (*b*) 1 *Co. 88 b.*  
 (*c*) 2 *P. Wms.* 471.  
 (*d*) 19 *Beav.* 198; and see  
*Poad v. Watson* (*Exch. Ch.*

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 (*e*) 2 *Y. & Jer.* 622.  
 (*f*) 7 *T. R.* 342, 438.  
 (*g*) 1 *Keen,* 33.

*Earl of Suffolk (a); Stringer v. Phillips (b); Cripps v. Wolcott (c); M'Donald v. Bryce (d); 2 Jarm. on Wills (e); Maberly v. Strode (f); Hodgson v. Smithson (g); Wordsworth v. Wood (h).* But at all events the rule does not apply to real estate; *Doe d. Long v. Prigg (i); Rose v. Hill (k)*; where there was a devise to five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants. This was held to be a tenancy in common in fee to the five, the word "executors" being in a will equivalent to "heirs," and the words "survivors and survivor" relating to the death of the testator. So in *Garland v. Thomas (l)*, a testator devised to trustees and their heirs to the use of his three nieces, and the survivors and survivor of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint tenants; and upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that Court certified that the devisees took as tenants in common, survivorship being referred to a decease in the lifetime of the testator. So in *Wilson v. Bayly (m)*.

Mr. Roupell and Mr. W. D. Lewis, for *Richard Caton Borrell*, the first tenant for life of the Sudford estate under the marriage settlement of *Charlotte*.

Mr. Teed for the assignees of *Richard Caton Borrell*, contended

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|----------------------------------------------------|-----------------------------------------------------------|
| (a) 1 P. Wms. 96; 4 Bro.<br>P. C. 574.             | (g) 21 Beav. 354.                                         |
| (b) 1 Eq. Ca. Abr. 292.                            | (h) 2 Beav. 25; 4 Myl. & Cr.<br>641; 1 H. of L. Cas. 129. |
| (c) 4 Madd. 11.                                    | (i) 8 Barn. & Cr. 231.                                    |
| (d) 16 Beav. 581.                                  | (k) 3 Burr. 1881.                                         |
| (e) Pages 631 (1st edit.), and<br>600 (2nd edit.). | (l) 1 Bos. & Pul. (N. R.) 82.                             |
| (f) 3 Ves. 450, 454.                               | (m) 3 Bro. P. C. 195.                                     |

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contended that the granddaughters took estates for life; that the estate given to the trustees to preserve contingent remainders was a legal estate in fee; that the words "issue male," were words of purchase; that an estate tail in remainder was limited to the issue male of the granddaughters successively, in the order in which they were named, but that being an equitable estate tail, it did not coalesce with the legal life estate given to the granddaughters; consequently that the result was, that *Richard C. Borrell*, being the only issue male, was entitled to the whole estate as tenant in tail. He commented on *Beaumont v. Marquis of Salisbury* (a); *Curtis v. Price* (b); *Doe d. Harris v. Taylor* (c).

Mr. *Lloyd* and Mr. *W. Forster*, for the Defendants Mr. and Mrs. *Haig* and Mr. and Mrs. *Brown*, cited, as to the implication of cross remainders, *Phipard v. Mansfield* (d); *Vanderplank v. King* (e). As to the operation of the rule in *Shelley's* case (f) not being prevented by the interposition of trustees to preserve contingent remainders, *Wright v. Pearson* (g), or by the words "equally to be divided," *Doe d. Atkinson v. Featherstone* (h). As to the distinction between a joint tenancy and a tenancy for life estate, benefit of survivorship, or a *jus accrescendi*; *Doe d. Borwell v. Abey* (i); *Doe d. Littlewood v. Green* (k); *Edwards v. Champion* (l). They also cited *Glenorchy v. Bosville* (m); *Trevor v. Trevor* (n); *Doe d. Baldwin v. Rawding* (o).

Mr.

- (a) 19 *Beav.* 198.
- (b) 12 *Ves.* 89.
- (c) 10 *Q. B.* 718.
- (d) *Coupl.* 797.
- (e) 3 *Hare*, 1.
- (f) 1 *Co.* 88 b.
- (g) 1 *Eden*, 119.

- (h) 1 *Barn. & Ad.* 944.
- (i) 1 *Mau. & Sel.* 428.
- (k) 4 *Mee. & Wels.* 229.
- (l) 1 *De G. & Sm.* 75.
- (m) *Cas. temp. Talbot*, 3.
- (n) 1 *H. of Lds. Cas.* 239.
- (o) 2 *B & Ald.* 441.

**Mr. R. Palmer** and **Mr. Dart**, for the surviving  
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**Mr. Follett** and **Mr. Pemberton**, **Mr. Bagshawe** and  
~~Mr. Broderick~~, for other Defendants, contended that  
“issue male” meant first and other sons of the grand-  
daughters who were to take successively in tail, those  
of the eldest taking first and so on, and that the word  
“remainders,” and the fee limited to trustees to preserve  
them, shewed that this was the proper construction.  
They cited *Cook v. Cook* (*a*).

*The MASTER of the ROLLS*, before hearing **Mr. Lee**  
in reply, intimated his opinion, that “benefit of survivorship” meant not the persons to take, but was descriptive of the estate; that is, they took as tenants in common, but with that benefit.

**Mr. Lee**, in reply.

The following cases were also cited: *Stringer v. Phillips* (*b*); *Hawes v. Hawes* (*c*); *Burgis v. Burgis* (*d*); *Perrin v. Blake* (*e*); *Porter v. Bradley* (*f*); *Doe d. Blake v. Luxton* (*g*); *Blagrave v. Blagrave* (*h*); *Rabbeath v. Squire* (*i*).

*The MASTER of the ROLLS.*

Upon the first point in this case, which is the question arising from the words “with benefit of survivorship,” it is not my intention to express any opinion whatever, whether the rule laid down by *Sir John Leach* in

(*a*) 3 *Vern.* 544.

(*f*) 3 *T. R.* 143.

(*b*) 1 *Eq. Ca. Abr.* 292.

(*g*) 6 *T. R.* 289.

(*c*) 1 *Wils.* 165.

(*h*) 1 *De G. & Sm.* 252.

(*d*) 1 *Mod.* 115.

(*i*) 19 *Beav.* 77.

(*e*) 4 *Burr.* 2579.

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in *Cripps v. Wolcott* (*a*) applies to real estate or not. In my opinion, upon the words of this will, that question does not arise; for, upon a consideration of all the cases which have been referred to upon this subject, it appears to me that they are all of them distinguishable from the words of this will, which preclude any such questions from arising. There are two matters always to be regarded in any devise or bequest: one is, who are the persons to take; and, secondly, in what manner they are to take? If the Court sees clearly who are the persons who are to take, that settles the first point, and there remains the question in what manner and what is the species of estate they are to take. If the words of the will are clear upon that subject, the Court cannot take part of the words which relate to the manner in which they are to take the estate, and import them into that part which describes the persons who are to take.

Now, the words of the will are these:—Upon the death of the two tenants for life, Mr. and Mrs. *Adams*, the testator says, “I give and devise all the last-mentioned estate unto and amongst the said *Harriet*, *Charlotte*, *Margaret* and *Georgiana*.” If we stop there, the will specifies the persons who are to take, and there are four. Then, how are they to take? He goes on immediately to say they are “to hold to them as tenants in common, and not as joint tenants, during the term of their respective natural lives,” and then he says, “with benefit of survivorship.” It is said, that I must take these words, “with benefit of survivorship” out of the clause which says in what manner they are to hold it, and introduce it into the clause which says who are the persons who are to take. Now, *Rose v. Hill* (*b*), and all that class of cases, with the exception of *Maberly v. Strode*,

(*a*) 4 *Madd.* 11.

(*b*) 3 *Burr.* 1881.

*Strode(a)*, to which I will refer in a moment, use expressions either of this nature or tantamount to it:—"To hold to *Harriet, Charlotte, Margaret* and *Georgiana*, and the survivors of them;" and then the question was, (inasmuch as the word "survivors" was introduced into the clause relating to and descriptive of the persons who were to take,) what was meant by the word "survivors," i. e. whether they were to be survivors at the death of the testator, or at the period when the fund was to be distributed: that was the question which arose in all those cases. Undoubtedly there can be no question, that if there be a simple devise to four persons, to hold to them as tenants in common, with benefit of survivorship and nothing more, that would mean that the four are to hold it as tenants in common, and that as one dies the survivors are to take the benefit of that estate. That would be the plain and obvious meaning, and I have not been referred to a single case which contradicts that. The plain and natural import would be, that this would be descriptive of the particular estates which the four devisees were to take in the estate devised.

*Maberty v. Strode(a)* has been referred to, which was a case of this description:—the testator devised the property to two nephews and his niece, in equal proportions, share and share alike, and their issue, or the issue of either of them, to take the parent's share, with benefit of survivorship, to my nephews and nieces. In that case the word "or" was construed "and," and the point is, whether that case with reference to the words "with benefit of survivorship," is to control the present. Lord *Alvanley* justly observes in that case, nothing can be more obscure than those words. He gives to the two nephews and the nieces in equal proportions, share and share

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share alike, their share to go to their issue, and then with benefit of survivorship. Then the first question was this:—Did the words “with benefit of survivorship” apply to the persons who were to take, or to the estates which they were to take? And Lord *Alvanley* evidently held, and so it was contended, that the only way of giving a rational meaning to the words “with benefit of survivorship” was, to make them apply them to the persons who were to take, and that you must read the words exactly in the same manner as if they were “to my nephews *William* and *James*, and my niece, in equal proportions, share and share alike, with benefit of survivorship,” as if the words “with benefit of survivorship” had been there introduced, and which was equivalent to introducing the words “and the survivors.”

But no person can read the present will in this manner, it would be using a degree of violence with respect to the expressions of a testator, which the Court would never be justified in doing, if, where a testator gives his estate to four persons, to hold to them as tenants in common for the term of their natural lives, with benefit of survivorship, I were to transpose those words “with benefit of survivorship,” and introduce them immediately after the names of the four devisees, and read the will thus: “I devise to four persons, with benefit of survivorship, to hold to them as tenants in common.” The words have a distinct and natural meaning in the position in which they stand in the will, as shewing that when one tenant in common dies, the three remaining tenants in common will take the whole estate between them; and when a second dies, the other two will take it, and so on to the last, who will take the whole.

Mr. *Lee* suggested that that was an exceedingly irrational species of will to make, and that the Court cannot impute

impute such an intention. My answer to that, in the first place, is, that it is a very common mode of disposing of property, as the Court constantly sees in cases of personality; but that whether it be so or not, if the words are express and distinct on the subject, I must follow the words which the testator has used, and I see no difficulty whatever in coming to that conclusion.

The testator gives the estate to them as tenants in common, and not as joint tenants, for the term of their natural lives; but it is impossible to say that the words "not as joint tenants" add any thing whatever to the force of the previous words "as tenants in common."

Then, it is suggested, that the words "with benefit of survivorship," in point of fact reduced the gifts to a joint tenancy; but Mr. *Lee* did not press that, because he felt, that in fact a tenancy in common to four tenants in common, with benefit of survivorship (I use the same expression as it is short) amongst them, is a perfectly different and distinct estate from a joint tenancy, which has different incidents to it, and may be affected in a different manner: thus, it may be severed in the one case, but not in the other. I am of opinion on the first part of this case, that the words of the will are express and distinct, that on the expiration of the life estates to Mr. and Mrs. *Adams*, the property is given to these four granddaughters, to hold to them as tenants in common till one dies, and then to the remaining three as tenants in common till a second dies, then to the survivors and to the last survivor for her life, and that upon the death of the survivor the subsequent estates arise.

The next question is, what those estates are? I am of opinion in this case, that the estates which they

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they took were several inheritances in tail, upon the death of the surviving tenant for life. It was suggested to me, in the first place, that the word "issue" is to be construed as a word of purchase, and not as a word of limitation. There can be no question that the word "issue" is not so strong a word as "heirs;" but the general meaning of the word "issue" is, that it is a *nomen collectivum*, and includes all, that is, the whole class of descendants. It may undoubtedly be cut down, if the testator, in his will, show a plain intention that he intended it to be cut down; but, in the absence of any such plain intention, the general effect must be given to it, and it must be held to be a word of limitation. If the word "issue" means only the sons or grandsons upon the death of the granddaughters, then it appears that there are no words of inheritance to give them anything further than an estate for life. This is an extremely improbable intention to attribute to the testator, and strengthens the general proposition of law as to the meaning of the words "issue male." I think it has not been argued, and I am satisfied it cannot be reasonably argued, that if the estates were simply to the granddaughters for life as tenants in common, with remainder to the issue male of the granddaughter, successively, lawfully to be begotten, and in default of such issue remaining to my right heirs, that those estates would not coalesce, and that that would not give an estate tail to the granddaughters.

But then it is suggested that the interposition of the estate to the trustees makes a difference, and the question is, what is the effect of the interposition of that estate? If the estate interposed to the trustees were an estate in the manner I am about to read it, "to *John Thomas Bell* and *William Gibbon*, and their heirs, for the lives of the four granddaughters, and the life of the survivor,

survivor, upon trust to support the contingent remainders hereinafter limited," it could not then be suggested, upon the authority of the cases, that the limitation to the trustees would have any effect whatever in preventing the coalition of the remainder with the life estate; and Mr. Lee has referred me to those cases (which have been since followed), that the mere interposition of such an estate under the notion that he was creating a contingent remainder, although in point of fact he was not, would not prevent the tenants for life from taking an estate tail; but that the coalition would take place, and that the rule in *Shelley's Case* (*a*) would apply, though the word "heirs" was not used, and that they would take estates tail. But the estate here given is not a descendible freehold, limited and to be determined upon the death of the tenants for life, and the survivor of them; but the estate is given to the trustees and their heirs in this case by way of remainder after the estate to the granddaughters; upon that it is contended, that you must assume that the testator intended to give the trustees an unlimited fee, and to create subsequent trust estates, and that you must give effect to the meaning and object of the testator. That is not my opinion: by using the words "to support the contingent remainders hereinafter limited" (although he made a mistake respecting it), he shews that he considered that the estate of the trustees was only to last until the subsequent estates, which he limited in remainder, took effect; and I concur in the observation which has been cited from a great number of cases, and which is well expressed in *Blaggrave v. Blaggrave* (*b*), that where the purposes of the trust upon which an estate is devised to trustees is such as not to require a fee, but may be accomplished by a more limited estate, and that is shewn

1856.  
HADDELEY  
v.  
ADAMS.

(*a*) 1 Rep. 88b.

(*b*) 1 De G. & Sm. 252.

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HADDELEY
v.
ADAMS.

shewn in the will, the trustees will not take any greater estate than that which the purposes of their trust require. There is an abundance of cases which establish that proposition. I am at a loss to see why, in this case, I should extend the estate of these trustees for any purpose beyond that of supporting the remainders, because the testator in this case fell into the error of supposing that the remainders, which he limited after the estates for life were contingent remainders, which undoubtedly they were not.

But, as I have already observed, if the estate to the trustees to preserve contingent remainders were limited to the lives of the tenants for life, and the life of the survivor, and would not produce that effect, as the intention of the testator was not to be inferred from his using the word "contingent" in that case, so neither ought it to be inferred in the present case, although the estate to them is not limited to that period to which a skilful draughtsman, or a draughtsman under ordinary circumstances would have limited it.

I am of opinion, therefore, that the estate to the trustees is not an estate in fee simple, and that the estate given to the issue in tail is not a trust estate, but that, in fact, the issue in tail of the grandchildren take legal estates immediately on the death of the survivor of the tenants for life.

The observations made with respect to the particular and general intent apply strongly to the present case. Supposing the view were taken which is suggested by Mr. *Bagshawe*, and those who take his line of argument, how would the second child take if it was an estate tail limited to the first child? The second child could only take an estate tail by an estate tail being limited

limited in the mother, by means of which the general intention would give an estate of inheritance to all the issue.

1856.
~~~~~  
HADDELEY  
v.  
ADAMS.

I am of opinion upon this will that there is an estate given to the four granddaughters as tenants in common, and to the survivors of them, and to the last survivor, and that there are several estates tail limited to the granddaughters upon the decease of the surviving tenant for life, and I will make a declaration to that effect.

## PHILLIPS v. PARRY.

April 29.

THE testator devised a freehold called *Upper Scoverton* to *Phillips* and *Barnard*, "upon trust, in the first place, out of the rents, or by mortgaging," &c. to raise, in aid of his personal estate, (if insufficient,) so much money as should be requisite to satisfy his personal and testamentary expenses and debts, "and also the mortgages specifically charged upon the hereditaments next thereafter devised to his daughters *Margaret Barnard* and *Elizabeth Parry*." And subject thereto and to the payment of 3,500*l.*, charged upon *Upper Scoverton*, by way of mortgage, he devised the same upon trusts in favour of his son *John Arthur Parry* and his children.

A testator devised an estate (X.) to trustees, upon trust to raise (in aid of his personal estate) sufficient to satisfy his debts and the mortgages on his estate (Y.), which he devised to his daughters; and he declared that the incumbrances on Y. should be payable out of X. "in exoneration of" Y. On the testator's death, a real estate (Z.) descended to

The testator then devised his freehold, called *Little Hounborough*, to his daughters *Margaret Barnard* and *Elizabeth*

his heir at law. Held, that as between X. and Z., the former was primarily liable to pay the mortgage and other debts.

1856.

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PHILLIPS
v.
PARRY.

Elizabeth Parry, equally, as tenants in common in fee; and he thereby expressed his will to be, that all mortgages and other incumbrances, at his decease, charging or affecting the lastly devised hereditaments, should (in case his personal estate should prove insufficient) be deemed to be charged upon and payable out of the hereditaments called *Upper Scoverton*, firstly devised, in exoneration of his said hereditaments lastly devised. The testator appointed the Plaintiffs, *Phillips* and *Barnard*, executors and trustees of his will.

By a codicil to his will, the testator, after reciting that he was entitled, as heir at law to two of his deceased children, to their shares in a mortgage and premises called the "Duke's Head," devised the same to his said son, *John Arthur Parry*, in fee.

The testator died in *December*, 1853.

The personal estate being wholly insolvent, and the *Upper Scoverton* estate not being of sufficient value to enable the Plaintiffs to raise, out of the rents and profits thereof, or by mortgaging or charging the same, the sum requisite to satisfy the several sums charged thereon, the Plaintiffs filed their bill for a sale of *Upper Scoverton*; in *November*, 1854, a decree was made directing a sale, and the estate was accordingly sold. It was discovered, however, after the decree in the original suit, that the testator, besides the shares in the "Duke's Head," which he inherited from his children, was himself entitled in fee to two-fifths thereof, which, not being disposed of by his will or codicils, descended on *George Parry*, his son and heir at law.

In this state of things, the devisees under the will claimed

claimed to have the descended estate applied in payment of the testator's debts and the mortgages, before the *Upper Scoverton* estate; but *George Parry*, the heir, insisted that the descended estate was not liable to the payment of the debts till the whole of the proceeds of the *Upper Scoverton* estate had been exhausted. The Plaintiffs filed a supplemental bill to bring this question before the Court.

Mr. *Lloyd* and Mr. *Bevir*, for the Plaintiffs, the trustees.

Mr. *R. Palmer* and Mr. *W. Hislop Clarke*, for the Defendant, *George Parry*, contended that the *Upper Scoverton* estate was made specifically and primarily liable for the payment of the debts. They referred to *Donne v. Lewis* (*a*) ; *Manning v. Spooner* (*b*) ; *Harmood v. Oglander* (*c*) ; *Milnes v. Slater* (*d*) ; *Webb v. Jones* (*e*).

Mr. *Follett* and Mr. *Bennett*, for the other Defendants, argued that the descended estates were liable for the mortgage and other debts before the *Upper Scoverton* estate, which was a devised estate, and especially as, in this case, the testator had declared his intention that the exoneration should only take place as between the two devised estates, and not as regarded the descended estates. They cited *Lomax v. Lomax* (*f*) ; *Barnewell v. Lord Cawdor* (*g*) ; *Phillips v. Parker* (*h*).

The Master of the Rolls.

I am of opinion that the *Upper Scoverton* estate is primarily

(*a*) 2 *Bro. C. C.* 256.

(*b*) 3 *Ves.* 117.

(*c*) 8 *Ves.* 124.

(*d*) 8 *Ves.* 295.

(*e*) 2 *Bro. C. C.* 60 ; 1 *Cox*,

245.

(*f*) 12 *Beav.* 285.

(*g*) 3 *Madd.* 453.

(*h*) *Tamlyn*, 136.

1856.
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PHILLIPS  
v.  
PARRY.

1856.

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PHILLIPS
v.
PARRY.

marily liable for the payment of the debts. The devise is as distinct as can be. It is this—[*His Honor read the clause.*] This, therefore, is an express devise, upon trust to pay all his funeral and testamentary expenses and debts out of the *Upper Scoverton* estate, and then the moneys secured or charged by way of mortgage on the estates devised to his daughters. The subsequent direction was only what he said before. *Barnewell v. Lord Cawdor (a)*, was a general devise; and *Lomax v. Lomax (b)*, can be no authority for this, for in that case, no estate at all was made applicable to the payment of debts. I think the descended estates are not applicable to the payment of debts till the *Scoverton* is exhausted.

(a) 3 *Madd.* 453.(b) 12 *Beav.* 285.

SPICER and Wife *v.* DAWSON and LAWSON.

May 30.

Application for substituted service of a *subpœna ad testificandum*, or, in the alternative, that a solicitor might produce his client before the Examiner, refused.

AN application was made on behalf of the Defendant *Lawson*, that service of a *subpœna ad testificandum* on Mr. *Day* (a solicitor) might be good service on the Plaintiff Mrs. *Spicer*, or that Mr. *Day* might be ordered to produce Mrs. *Spicer* for examination before the Examiner.

The grounds of this application were, that Mrs. *Spicer* was secreted and kept out of the way by *Day*, who acted both as her solicitor in another suit (*Lawford v. Spicer*), and for *Dawson* in the present suit, that her residence was unknown, and that the only means of communicating with her was through *Day*, who refused to disclose her address.

That

That her evidence was material, and that she could not be served with the *subpæna*.

Mr. Selwyn and Mr. Hemming, in support of the application, argued, that the Court had jurisdiction to order the substituted service of a *subpæna*, when a party kept out of the way to avoid service, as all that was required was a reasonable certainty that the party had notice of the proceeding; *Hope v. Hope* (a). That it was a serious misconduct on the part of a solicitor to keep a witness out of the way (b), and that the Court had jurisdiction to order a solicitor to produce his client, as was done by a Court of Common Law in *Shaw v. Neale* (c).

1856.
SPICER
and Wife
v.
DAWSON
and Another.

Mr. Roupell and Mr. Morris, Mr. Lloyd and Mr. Martindale, were not heard.

The Master of the Rolls.

I cannot make any order. I do not recollect any such order ever having been made, and feel no inclination to be the first to make the precedent.

(a) 19 Beav. 237. Mees. & W. 28.
 (b) See *Stephens v. Hall*, 10 (c) 20 Beav. 164.

1856.



WALDRON v. BOULTER.

May 28.

A testator bequeathed leaseholds equally to his four grandchildren, and after their decease, to "such lawful issue" as they or any or either of them should leave. Held, that on the death of each grandchild, his issue of every degree then living became equally entitled to his one-fourth, and that issue was not to be read "children," though in a subsequent gift he had used that expression.

Under a similar devise of renewable leaseholds and copyholds to the four grandchildren equally, and after their death, "for such children as they or any or either of them should leave her or him surviving." Held, that on the death of each grandchild, his "children" then surviving took as tenants in common.

THE testator bequeathed a leasehold property to trustees, upon trust to pay and divide the rents "equally between and amongst his four grandchildren, *Thomas, Mary, Penelope and Susannah*." And he proceeded thus:—"And from and after the decease of my said grandchildren, *in trust for such lawful issue* as they, or any, or either of them, shall leave, lawfully begotten, as tenants in common."

The testator afterwards gave and devised some renewable leasehold and a copyhold messuage called *Woodwale*, to his said trustees, upon trust to pay and apply the rents "equally between and among" the same four grandchildren, share and share alike. He proceeded thus:—"And from and after the death of my said grandchildren, then in trust for such *children* as they, or any or either of them shall leave her or him surviving, as tenants in common, and if but one such child, then the whole to that child."

The testator died in 1803.

Mary died in 1811, *Susannah* in 1840, *Penelope* in 1854, and *Thomas* in 1855. They all left children, and some of them left grandchildren surviving them.

Questions arose as to the constructions of their bequests, which now came on for argument.

Mr.

Mr. Druse, for the Plaintiffs, referred to *Arrow v. Mellish* (a), *Abrey v. Newman* (b).

1856.

WALDRON
v.
BOULTER.

Mr. Berkeley contended, that "issue" in the first bequest was to be construed "children," and, therefore, that the grandchildren of the four grandchildren were excluded. He cited *Furmer v. Francis* (c). Secondly, that the grandchildren of the testator took one-fourth for life, with remainder, as to each fourth, to their respective children; *Willes v. Douglas* (d).

Mr. C. Roupell for grandchildren of the testator's grandchildren, argued, that the word "issue" included all issue living at the period of distribution.

Mr. Piggett, for other Defendants.

The Master of the Rolls thought that all the "issue" of each grandchild, of every degree, living at his death, were included in the first gift. He said, that the argument that the use of the word "children" in the second gift shewed that the expression "issue" was, in the first, to be limited to "children" cut both ways; that it was evident, that when the testator intended the "children" of his grandchildren, he used that expression; but when he meant all the descendants, he adopted the expression "issue."

With respect to the other point, he thought (as regarded the first gift) that the grandchildren took as tenants.

(a) 1 *De G. & Sm.* 355.
(b) 16 *Brow.* 431.

(c) 2 *Sim. & Stu.* 505.
(d) 10 *Brow.* 47.

he would make the order; but he doubted whether the Accountant-General would act on it.

1856.

In re

CHAMBERLAIN.

NOTE.—The following is one of the cases referred to by Mr. Rogers:—

1841.

BADELEY v. KING.

April 28.

ABSTRACT OF DECREE.

Order certain funds to be transferred into Court.

Declare the Defendant, *H. M. King*, entitled for life to the interest and dividends, &c. on the fund in Court and that to arise from the outstanding estate.

Liberty for *H. M. King* to receive, from time to time, the share of the testator in the dividends from funds in another suit of *Mackenzie v. Gear*, and after keeping up a policy, to pay the residue into Court, and order its investment.

Order the dividends to accrue on the Bank Annuities, when so respectively purchased under the directions *hereinbefore and herein-after given*, and also the interest on the funds in Court, to be paid to *H. M. King* for life.

Order *H. M. King* to pay into Court any sum hereafter received by her in respect of the outstanding estate (the amount to be verified by affidavit), and order its investment in the Three per Cents. (a).

(a) *Reg. Lib.* 1840, A., fol. 787.

1856.

*Re ASHTON CHARITY.**May 3.*

The Court of Chancery has jurisdiction to alien the real estate of a charity, and it can do so upon an application under Sir *Samuel Romilly's Act*.

AN order for the sale of charity land had been made, under Sir *Samuel Romilly's Act* (*a*), before the passing of the Charitable Trusts Act, 1853 (*b*).

The purchaser, whose advisers doubted whether the Court had jurisdiction to sell charity lands under Sir *Samuel Romilly's Act*, required that the sale should be confirmed by the Charity Commissioners (*c*) ; but this the vendors declined to do, and the matter now came before the Court.

Mr. T. H. Terrell, for the trustees of the charity.

Mr. Wickens, for the Attorney-General.

Mr. Dart, for the purchaser. The statute of 52 *Geo. 3*, c. 101, provides a remedy, first, in case of breaches of trusts, and secondly, "whenever the direction, or order, of a Court of Equity shall be deemed necessary for the *administration of any trust* for charitable purposes." It does not form part of the *administration* of a charitable purpose to sell the very estate which the founder intended to uphold it. Although the point appears to have been decided in *Re Parke's Charity* (*d*), and *In re The Overseers of Ecclesall* (*e*) : still Sir *E.*

Sugden

(*a*) 52 *Geo. 3*, c. 101.

(*c*) 16 & 17 *Vict.* c. 137, ss.

(*b*) 16 & 17 *Vict.* c. 137, 24, 26.
amended by 18 & 19 *Vict.* c. 124.

(*d*) 12 *Simp.* 329.
(*e*) 16 *Beav.* 297.

Sugden was of a contrary opinion in the case of *In re The Suir Island Female Charity School* (*a*) ; so *In re Alderman Newton's Charity* (*b*), Lord *Cottenham* expressed a doubt as to the jurisdiction ; and *In re Lyford's Charity* (*c*), the Court "hesitated in making a similar order." With such a doubt existing as to the jurisdiction under the act, the title cannot be forced on an unwilling purchaser, unless perfected by the confirmation of the Charity Commissioners ; and the application to them can only be made by the trustees of the charity. *Re Hall's Charity* (*d*).

1856.
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*Re Ashton*  
Charity.

*The Master of the Rolls.*

I have before had to consider this point. My opinion is, that upon an information, the Court of Chancery has a general jurisdiction, as incident to the administration of a charity estate, to alien charity property, where it clearly sees it is for its benefit and advantage.

I think that this power may also be exercised under the stat. of 52 Geo. 3, c. 101.

That being my opinion, the title can be forced on a purchaser.

(*a*) 3 *Jones & Lat.* 171.  
(*b*) 12 *Jur.* 1011.

(*c*) 16 *Beav.* 297, note.  
(*d*) 14 *Beav.* 121, note.

1856.

*May 28, 30.  
June 2.*

In a will, the word "or" was read "and," to give effect to the manifest intention.

The testator bequeathed £4,000. to his four sons, *B.*, *C.*, *D.* and *E.*, in trust for *A.*

for life, with remainder to his issue, and in default, to the four sons "or" to such other of his sons as should be trustees in succession. He provided, that on the death of either of the four sons, his next surviving son should become a trustee in his place. *A.* survived the four trustees, and died without issue, leaving two of the substituted trustees surviving.

Held, that they were not exclusively entitled to the legacy, but that it was divisible, equally, between them and the representatives of the deceased trustees.

## MAUDE v. MAUDE.

THE testator bequeathed a sum of 4,000*l.* to his four sons, *Thomas*, *Frederick*, *William* and *Joseph Maude*, upon trust, during the life of his son *Charles*, to pay the income to him, or for his support, &c., "as they, or the survivor of them, or their successors," should find it expedient, and after his death on certain trusts for his issue.

The will then proceeded in the following words:— "And in case my son *Charles* shall happen to die without issue, upon trust to divide the said principal sum, equally, amongst my said sons, *Thomas Maude*, *Frederick Maude*, *William Maude* and *Joseph Maude*, OR to such other of my sons as shall afterwards be, in succession, trustees for my said son *Charles*, by virtue of, or under the proviso hereinafter mentioned (that is to say), provided and I do hereby declare my will and mind to be, that when any of my said sons, *Thomas Maude*, *Frederick Maude*, *William Maude*, and *Joseph Maude*, shall happen to die, in the life time of my said son *Charles*, my next surviving eldest son or sons shall supply the place or places of him or them so dying; and in case of the deaths of any of my said son or sons so succeeding to the said trust, that the survivors of my said sons, according to their seniority, shall supply the place or places of my said son so dying."

He then empowered his sons who should, for the time being, be trustees for his son *Charles*, "to advance the said principal sum, or such part thereof as they should

should think proper, to or for the benefit or advantage of his son *Charles*, in such manner as they in their discretion should think fit."

1856.  
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MAUDE
v.
MAUDE.

The testator died in 1805, leaving eight sons (*Charles* included). *Charles*, the tenant for life, died in 1855, without issue, having survived the four original trustees, one of whom (*Thomas*) had died in 1849, leaving the Plaintiff his legal personal representative. Two of the testator's sons, who had become trustees in succession, were living at the death of *Charles*, and they claimed to be entitled to the whole 4,000*l.*

The Plaintiff filed the present bill, contending that the gift to the trustees vested in all who ever held that office; and he claimed one-seventh of the fund, in right of his testator, *Thomas Maude*. The question was argued upon a demurrer filed by the Defendants.

Mr. Follett and **Mr. C. Hall**, in support of the demurrer, contended, that the gift was in the alternative, i. e., to the four sons named, or those in succession, and belonged therefore to the two of the trustees who, by succession, were the existing trustees at the time the gift fell into possession.

Mr. R. Palmer and **Mr. Joliffe**, in support of the bill, contended, that the gift to the trustees, though disjunctive in terms, was conjunctive in meaning; that the word "or" must be read "and," to give effect to the intention of the testator; *Eccard v. Brooke* (a); that the gift, which was to a class, included all those who became trustees before the legacy became payable; and that it was evident that the testator meant a benefit to

conclusion, and I think that the opposite construction is the only way to give effect to the intention of the testator.

1856.

MAUDE
v.
MAUDE.

If this were read "or," it would be very difficult to carry the intention into effect, because it must be given to the four sons, or to such other sons as in succession might be trustees. If two of the four had died, and two others had become trustees in their place, and then *Charles* had died without issue, would the two original or the two new trustees take the fund? If they did not all take, one class must be excluded, and it would be impossible to conceive, that if two died, and the other two continued to perform the duty of trustees, they were to be excluded from the bequest, and that the other two, who had perhaps been trustees for two months, were exclusively to take the whole fund.

I think the meaning is this:—to be divided amongst the four sons, or to them and such other of my sons as shall, in the events which shall happen, under the proviso, act as trustees, that is, "or" must be read "and." So that it will read thus:—Upon trust to divide, &c., &c.

It is obvious that this is the more just construction, and that the other would be both unjust and repugnant to the intention and object of the testator.

I am therefore of opinion that this is one of those cases where "or" must be read "and;" and that all the sons of the testator, who have acted as trustees, are entitled to share in the legacy, and that, therefore, the representatives of those, who having acted, have since died, are entitled to a share.

1856.

*May 26, 27,
28.*

PITT v. PITT.

Charge paid off by a person having only a partial interest in the estate— Held not to have merged.

In 1824, A. purchased an estate, and he mortgaged it to raise part of the purchase-money. In

February, 1840, the mortgage was paid off and transferred to B., who in April, 1840, executed a declaration of trust in favour of A. A. died in 1848. Held, that the charge had merged.

THE testator, *Stephen Pitt*, was, under the marriage settlement of his father, (1772,) tenant in tail of a moiety of a real estate, subject to a term of 500 years, for raising 4,000*l.* for portions of his father's younger children.

The other moiety of the estate was, in 1796, devised to *Samuel Pitt* and *Mary Pitt* (the brother and sister of the testator *Stephen Pitt*).

On the 21st of *January*, 1824, *Stephen Pitt* barred his estate tail in the moiety of the estate and resettled it on himself for life, with remainder to his issue, and in default to his brother, his brother's wife and their issue. The settlement contained a power to *Stephen Pitt* "to limit the moiety to the use of the Defendant, *Elizabeth Pitt* his wife, for her life, in case she should survive him, without impeachment of waste, and a power for the testator to charge the same moiety, with 6,000*l.* to be raised and paid at such time to such person or persons and for such purposes as he should think fit."

On the 9th of *April*, 1824, the sum of 3,479*l.* (the amount of portions then remaining due) was raised by a mortgage to *Chippendale* and others of the 500 years' term. This mortgage was, on the 14th of *February*, 1840, transferred to *Colmer*, who, on the 15th of *April*, 1840, executed a declaration of trust, declaring that the money belonged to the testator, *Stephen Pitt*, and

and that he would hold it and the securities in trust for him.

By deed poll, dated the 20th of *June*, 1845, *Stephen Pitt* appointed his moiety of the estate to his wife for life, and he also charged it with the 6,000*l.*

As to another one-fourth of the estate belonging to his sister, it appeared that, in 1824, *Stephen Pitt* purchased it for 5,100*l.*, and to enable him to pay the purchase-money he mortgaged it for 3,500*l.* Subsequently, by indenture dated the 14th and 15th *February*, 1840, after reciting that *Stephen Pitt* was desirous to pay the 3,500*l.* to *Adlington* and *Gregory*, (the mortgagees,) and had applied to *Colmer* to advance the same, which he had agreed to do, the mortgagees, in consideration of 3,500*l.* to them paid by *Colmer*, at the request of the said *Stephen Pitt*, conveyed the fourth part of the estates to *Colmer*, subject to the equity of redemption, and they also assigned to him the 3,500*l.*

By a declaration of trust, dated 16th *April*, 1840, *Colmer* acknowledged that the 3,500*l.* was the proper money of *Stephen Pitt* the testator, and that he would stand possessed thereof, and of the securities, in trust for *Stephen Pitt*.

Stephen Pitt made his will, dated the 21st of *June*, 1845, whereby "he confirmed the appointment made to his wife for her life, and gave and devised all other his lands and hereditaments to his said wife and her assigns during her life; and, so far as he lawfully could, he declared that she should not be punishable for any waste so long as she should continue his widow." And he

1856.

Prtr
v.
Pitt.

1856.

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Pitt  
v.  
Pitt.

he devised the residue of his estate and effects to the Plaintiffs on certain trusts.

The testator died in 1848.

Under these circumstances, two questions arose; first, whether the sum of 3,479*l.* was a subsisting charge on the moiety of the estate, and, secondly, whether the 3,500*l.* was a charge on the one-fourth of the same estate purchased by the testator in 1824.

Mr. *Bazalgette* and Mr. *C. Roupell*, for the Plaintiffs.

Mr. *Follett* and Mr. *Bowring*, for the widow, argued, that neither sum was now charged on the estate, and that the widow took the property discharged of any liability to keep down the interest on the mortgages.

Mr. *R. Palmer*, for the first tenant for life.

Mr. *Rawlinson*, for other parties.

Mr. *Bazalgette*, in reply.

Duke *Chandos v. Talbot* (*a*); *Hood v. Phillips* (*b*); Earl of *Buckinghamshire v. Hobart* (*c*); *Burrell v. The Earl of Egremont* (*d*); *Astley v. Milles* (*e*); *Swabey v. Swabey* (*f*); Duke *Chandos v. Talbot* (*g*); *Johnson v. Webster* (*h*); *Grice v. Shaw* (*i*); *Forbes v. Moffatt* (*k*), were cited.

*The Master of the Rolls* reserved judgment.

*The*

(*a*) 2 *P. Wms.* 600.

(*b*) 3 *Beav.* 513.

(*c*) 3 *Swanst.* 186, 199.

(*d*) 7 *Beav.* 205.

(*e*) 1 *Sim.* 298, 341.

(*f*) 15 *Sim.* 106.

(*g*) 2 *P. Wms.* 610.

(*h*) 4 *De G., M. & G.* 474.

(*i*) 10 *Hare,* 76.

(*k*) 18 *Ves.* 384.

*The Master of the Rolls* (after stating the circumstances relating to the 3,479*l.*, proceeded) :—The question is, whether, in that state of circumstances, if it rested there, the 3,479*l.* could be said to have been merged in the inheritance; and I see no reason or pretence for saying that it would. What the Court is to look at is, to see what was the intention of the person who paid off the charge. That intention, in the absence of any circumstances, is to be gathered from what it was his interest to do; but if there be any circumstances affecting the matter, they also are to be regarded. Here it was clearly the testator's interest to keep the 3,479*l.* on foot as a substantive charge, because he had only a life interest in the property; and therefore, if he paid off this charge, he would be doing it for the benefit of his brother *Samuel* and for *Samuel's* wife and children, who were entitled to the inheritance. But by keeping the charge on foot, he had the power of disposing of it in any manner he thought fit. Then he causes it to be assigned to a trustee, in trust for him, his heirs, executors and administrators. I am of opinion that it was preserved, and is a subsisting charge, and that it is now part of his personal estate.

I have looked through the will very carefully, but there is nothing in it which at all affects this question. What he did was this:—The day before he executed his will, and, as a contemporaneous transaction, he exercised his power of appointment, and gave his wife a life interest in these two undivided moieties: and then, by his will, he desires that the property which he has given to her shall be given independently of her life estate, and that she is not to be impeachable for waste; but I think that this part of the will applies to what she took under the will, and not properly to what she took under the appointment, although undoubtedly the appointment

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appointment and will may be said to be a contemporaneous transaction. I think, therefore, as he has not given his wife any interest in the 3,479*l.* it must be treated as a subsisting charge.

With respect to the 3,500*l.* I have come to an opposite conclusion, for it rests on totally different grounds. The 3,500*l.* was part of the purchase-money paid to his sister, *Mary Bell*, for her one-fourth of the estate. That amount was borrowed from Messrs. *Addington and Gregory*, and they became mortgagees upon it. The testator, at the same time that he paid off the charge on the other two-fourths, paid off the mortgage on this one-fourth, and thereupon it was transferred to Mr. *Colmer* and kept alive by a declaration of trust, and it was declared that it was held on trust for him. The result is, that he, by his will, gives a life estate in this property to the wife; but, in point of fact, this was the absolute interest in the property; for he declares that the gift of the residue of his real and personal estate is not to prejudice her life interest, and that she is to be unimpeachable for waste, when, in point of fact, unless the property had risen in value, and that very considerably, he was giving her nothing at all. Having regard to these circumstances, and to the case of *Hood v. Phillips*(a), which was strongly pressed upon me, and which I cannot distinguish upon this point; and likewise bearing in mind that he was the owner in fee of this part of the property, I think that the 3,500*l.* must be held and must be declared to have merged in the inheritance, and consequently that the widow takes that part of the estate unaffected by any charge upon it.

(a) 3 *Bear.* 513.

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## HERVEY v. SMITH.

*May 30.*

**I**N 1839, Mr. *Cubitt* devised a piece of land abutting on *Halkin* Street, to Mr. *Felton*, for eighty years. In the same year Mr. *Felton* erected thereon a house, being No. 7, *Halkin* Street. The outer wall, to the south-west, was built partly on the adjoining land; it was pierced with fourteen flues, twelve only of which were used, and there was a single window in it on the third story. This wall was exposed like an external wall, no house being built up to it.

In 1844, Mr. *Cubitt* built a house, being No. 12, *Lounges* Street, on land also belonging to him, and which extended backwards from *Lounges* Street to the south-west wall of No. 7, *Halkin* Street. He built, on the ground floor and on the basement of 12, *Lounges* Street, in the rear and up to the wall in question, a room used as a butler's pantry and store-room. But the building at the back was not carried higher than the ground floor. The two vacant flues in the wall were then appropriated to, and connected with, the fire-places in the butler's pantry and store-room.

In November, 1845, the surveyors of Mr. *Cubitt* and Mr. *Felton* met, and measured the portion of the south-west wall thus used by the former, including the two flues, treating it as a party wall, and in January, 1846, Mr. *Cubitt* paid to Mr. *Felton* 25*l.* his proportion of the wall under the Building Act.

*A.* sold to *B.* (the owner of the adjoining premises) the right of using two chimneys in *A.*'s wall.

The consideration was paid, and they were used for eleven years, but no grant was executed. *C.* purchased *A.*'s house without

notice of the right; but there being fourteen chimney-pots on the wall and only twelve flues in *A.*'s house, the Court held, that *C.* was put on inquiry, that he had constructive notice of the right, and was bound by it, and an injunction was granted to restrain him from stopping up the two chimneys. It was also held, that it was not necessary that the bill should

In pray for a specific performance, and that the absence of a grant was immaterial.

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In December, 1845, Mr. Cubitt demised No. 12, *Lowndes Street* for seventy-four years, and this lease was now vested in the Plaintiffs.

In 1848, Mr. Felton demised No. 7, *Halkin Street* for twenty-one years; and, in June, 1852, this lease was in consideration of 100*l.* assigned to the Defendant *Smith*.



In none of these documents was any mention made of the easement, as regarded the two flues, attached to the one house through the wall of the other. The two chimneys continued to be used by the occupiers of 12, *Lowndes Street*, from 1844 until February, 1855, when the Defendant experienced some annoyance from the smoke descending into his house. On examination he found it proceeded from the two flues in question, which, as he stated, he then, for the first time, discovered were used by the occupiers of No. 12, *Lowndes Street*. The annoyance not having been discontinued, he caused the two chimneys to be stopped up.

The Plaintiffs filed their bill for an injunction, which was granted (*a*). The Defendant then put in his answer, by which he stated, that he had not, at the time he purchased the lease, any knowledge, notice or suspicion that the south-west wall of No. 7, *Halkin Street* was built for a party wall, or otherwise than as an external wall, or that there were any flues therein which were used by the tenant of No. 12, *Lowndes Street*, or that any part of the wall stood upon land which was not demised by his lease of 1848.

He also stated, that the wall was of such a thickness as

(*a*) See 1 *Kay & J.* 389.

as not to have been lawfully built as and for a party wall; and having regard to the provisions of the Building Act which was then in force (14 *Geo. 3*, c. 78), it appeared to have been built as an external wall only, and that the window built in it was wholly inconsistent with its having been built as a party wall.

He said it was customary to build extra flues in case they might afterwards be required.

One circumstance relied on in the judgment of the Court was this:—That externally on the wall in question, there appeared to be fourteen chimney pots, shewing as many flues; whereas, in the house in *Halkin Street* there were only twelve fire places.

The cause now came on for hearing.

Mr. R. Palmer and *Mr. Nalder*, for the Plaintiffs.

Mr. Southgate, for the Defendant. First, the Plaintiffs have no legal right under the Building Act, 14 *Geo. 3*, c. 78, s. 41; and, independently of that Act, he can have no legal title to the easement, which can only pass by a grant. Secondly, this is not a bill for specific performance, where, as a consequence of that relief, the Plaintiffs might be entitled to an injunction. Thirdly, there is no irremediable damage; it is a question of a money compensation, in respect of which a Court of Equity will not interfere, but leave the Plaintiffs to their rights at law. The whole matter in dispute cannot exceed the expense of building two new chimneys.

The MASTER of the ROLLS (without calling for a reply) said—

The view I take of this case is, that the question depends

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pends on the equitable rights between the parties. If it turned on the Building Act, I should go carefully through the affidavits, and possibly obtain some further assistance.

I look at the case in this view:—*Felton*, the owner of the property, for valuable consideration, allows the use of this wall and two flues to be made in it. He receives the consideration money, and that arrangement is acted on from the year 1844 to the present time; and, if the question arose between *Felton* and the Plaintiffs, there could be no doubt about it. It is true that a right of way or other easement over the land of another cannot be legally granted without some instrument in writing; yet, where an easement is sold by the owner of the land, and is enjoyed for years, this Court would hold that the agreement had been performed in every part except the conveyance, and would not allow it to be recalled by *Felton* or any person claiming under him, unless he made out that he was a purchaser for value without notice. In cases of easements the matter may be patent, as in the case of a footpath, or there may be actual notice, or the parties may be put on inquiry. Here the Defendant buys the house and finds twelve flues in it, but fourteen chimneys in the wall. The question is, was he not bound to see that he alone had twelve out of the fourteen, and does it not follow that two must have been used by the adjoining neighbour. He might not have thought fit to count them, or look at them, but I think he was put on inquiry, and that he cannot now say that he had no notice of the agreement by which *Felton* sold the right to *Cubitt*. That being so, the right of the Plaintiffs to the injunction follows as of course.

I do not accede to the argument that it was necessary to

to put this bill in the form of a bill for specific performance. The contract being complete, the money being paid, and the possession being given, this Court would prevent the possession from being interfered with by the vendor, although the purchaser does not ask for the specific performance of the contract. It does not appear necessary that the bill should pray specific performance.

I am of opinion that the Defendant cannot prevent the smoke passing through the two flues, and that he must be restrained from so doing. The costs must follow the event.

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BUTLER *v.* GREENWOOD.*April 18, 19.*

THE testator, *Henry Butler*, gave a fund to his trustees, on trust, in case his son *Thomas Butler* should not then be an outlaw, or an uncertificated bankrupt, or an insolvent debtor, or have done any act to encumber, to pay the income to him for life, or until he should be outlawed, become bankrupt, &c.; and after the determination of that trust, upon trust during the son's life, either to accumulate the income, or apply the whole or part for the maintenance of the son, his wife and children. And, after the son's decease, in trust for his children who should attain twenty-one, or be married. And, if there should be no child, then upon such trusts, &c. as the son should by will or codicil ap-

point;

son, discharged of all the trusts. By a codicil, the testator revoked the power given to the son, and directed that after the son's decease, and on failure of issue, the fund should go to the son's wife for life, and after her decease, form part of the testator's residuary estate. Held, that the discretionary power given by the will to the trustees was not revoked by the codicil.

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point; and, in default of appointment, the fund was to fall into the residuary estate. The will then contained provisions for the advancement, maintenance and education of the son's children.

Then followed a proviso, that notwithstanding any of the trusts and provisions thereinbefore contained, it should be lawful for the trustees, if they in their absolute discretion should think it expedient so to do, to make over to *Thomas Butler* all or any part of the trust fund, "freed and absolutely discharged, of and from all and singular the trusts and provisions hereinbefore expressed and declared concerning the same." He gave his residuary estate to other persons.

By a codicil, the testator, after reciting the bequest in his will to the trustees in favour of his son *Thomas*, and his son's wife and children, proceeded as follows:—"Now, I do hereby revoke the power of appointment over the fund so given to my son *Thomas Butler*, in default or failure of his issue, and do declare that after the decease of *Thomas Butler*, if he shall survive me, or after my decease, if *Thomas Butler* shall die in my lifetime, if there shall in either event be no child of *Thomas Butler*, who, being a son, shall attain the age of twenty-one years, or being a daughter shall attain that age, or marry, then my trustees shall stand possessed of the fund, upon trust, in case my son *Thomas Butler* shall leave a wife him surviving, to pay the interest thereof unto such wife for life, for her separate use, without power of anticipation; and, after her decease, I declare that the fund shall form part of my residuary estate."

The testator left *Thomas* and other children surviving.

*Thomas Butler*, who had not become bankrupt, &c., requested

requested the trustees to make over the fund to him absolutely under their discretionary power. They declined to do so without the sanction of the Court, and to determine whether they had authority to do so or not, a special case was presented to the Court, in which *Thomas Butler* was Plaintiff, and the residuary legatees, and the trustees, were Defendants.

The questions were, first, whether, notwithstanding the codicil, the discretionary power to the trustees was still in force; and, secondly, what was the true construction of the will and codicil with reference to the discretionary power.

Mr. *Lloyd*, for the Plaintiff, contended that the discretionary power given to the trustees was not revoked. That there were no direct words expressing any such intention, and to revoke by codicil a clear devise or bequest, the intention to revoke must be as clear as the devise or bequest itself; *Doe d. Hearle v. Hicks*; (a). That an intention to revoke could not be implied from the inconsistency of the codicil with the proviso, for the general dispositions in the will itself were equally inconsistent with it.

Mr. *Bird*, for all the Defendants, argued, that the power to the trustees had been revoked, and that it could not have been the testator's intention that the power should exist, for the bequest was so altered by the codicil that the power was neither natural nor incident to the gift, but simply the means of destroying it.

Mr. *Lloyd*, in reply.

*The Master of the Rolls* reserved judgment.

*The*

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(a) *8 Bing. 475; 1 Y. & J. 470.*

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Butlerv.Greenwood.March 19.*The Master of the Rolls.*

I cannot but express my feeling as to the unsatisfactory form in which special cases come before the Court. Practically all parties desire a particular decision; and though, undoubtedly, there is an argument on the other side, yet the Court sees and Counsel feel, the difficulty of arguing a case in opposition to the real wishes of a client; I therefore look at these cases with a great deal of hesitation, and I feel that I am rather expressing an opinion than pronouncing a decision.

By his codicil, the testator destroys the power of appointment over the property given by his will to his son, and the question is this:—whether he has hereby revoked the discretionary power to the trustees, to advance the whole of the money to the son *Thomas Butler*, whenever they may think it advisable so to do. I fully concur in *Doe v. Hicks*, and that class of cases which lay down, that a distinct gift by a will is not to be revoked by a codicil, unless by direct words or necessary implication. Now direct words there are none here, but the necessary implication would, in my opinion, be very strong, if it stood by itself, because a power to the trustees of giving the legacy absolutely to the son is totally inconsistent with the desire, that the wife and children shall enjoy it, and that the son should not dispose of it.

But I cannot get over the argument of Mr. *Lloyd*, that the same objection applies to the will itself, for the proviso is perfectly inconsistent with the directions and limitations contained in the will. By the codicil, after saying that the bequest stands upon certain trusts, specified

specified in his will, the testator revokes one of them only, namely, the son's power of appointment over the fund. Then, I think, it follows, that all the other trusts respecting this fund remain the same, and the will contains this express proviso :—that notwithstanding all the trusts contained in the will, the trustees shall have power to give the fund to the son, if they think fit.

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I feel some reluctance in deciding this case, because it is obvious that every one comes here with a desire to give the son this sum of money. However, I think that this is the proper construction of the will, and I will answer the case to that effect.

## NOTT v. RICCARD.

Jan. 28.

**O**N the 28th of *March*, 1855, the Plaintiffs sold some freehold property to the Defendant, subject to certain conditions of sale. The second condition stipulated, that the purchase was to be completed on the 22nd of *June* next. By the third condition, the vendors were to deliver an abstract of title, and it provided, that such title should commence "with the will of *Elizabeth Gay*, in 1827, and as *Elizabeth Gay* enjoyed the same long previous to that time, that the vendors should not be required to commence the title

Where there is an undue delay on the part of the vendor in making out his title, the purchaser, on reasonable notice, may put an end to the contract.

The Plaintiffs, on the 28th of *March*, 1855, agreed prior

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prior to such will, but the purchaser should be satisfied with a declaration of the *seisin* of *Elizabeth Gay*, in *fee simple* of the property, free from incumbrances, for thirteen years, prior to and at the date of her said will, and also, at the time of her death, which should be presumed and acted on without further evidence or inquiry."

The fourth condition was as follows:—"If no valid objection or requisition be made to or in respect of the title as shown by the abstract, and delivered to the vendors' solicitors in writing *within ten days after the delivery* of such abstract, the title shall be deemed accepted; but if any such can and shall be so made, and the purchaser shall not, on request, waive the same, the vendors shall be at liberty to rescind the contract."

The abstract was delivered on the 15th of *April*, 1855, accompanied by a declaration of *Henry Thomas*, a Thatcher, who stated that he had known the property and well remembered when it was in possession of Mr. *Thomas Gay*, and afterwards of his two only sisters, Miss *Elizabeth Gay* and Miss *Eleanor Gay*, who died upwards of twenty years since, on whose death, he had heard and believed that *Elizabeth Gay* became possessed of the same hereditaments and premises, as the sole and absolute owner thereof in *fee simple*, and was *seised* thereof as such sole owner for a period of twenty years and upwards prior to her decease in the month of *August*, 1832. He then stated that, during the sole ownership of *Elizabeth Gay*, the same were in the occupation of *John Nott* as her tenant.

The purchaser delivered his objections and requisitions upon the 23rd of *April*.

The

The third related to a consent in writing of Mr. and Mrs. *Beachey* to the sale; and the fourth was as follows:—

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“ 4. The declaration of *Thomas* is not sufficient. The declaration should show *Elizabeth Gay's* seisin in fee simple, and the freedom of the property from incumbrances; matters with which we conceive the *Thatcher* could scarcely be acquainted.”

On the 27th of *April*, the vendors returned the following answer to the fourth requisition:—“ It is submitted that the declaration of *Thomas* is most likely satisfactory and sufficient. The “ *Thatcher* ” is as likely to be or to have been an incumbrancer as any one else. The purchaser cannot require the vendors to procure evidence for the purpose of negativing the mere possibility of incumbrances.”

Nothing further was done until the 25th of *May*, 1855, when the purchaser pressed for an answer to the fourth requisition, but the vendors insisted that the former answer was satisfactory and that the objection had been waived and barred by time. The purchaser still insisted on the objections, and the vendors, on the 31st of *May*, 1855, wrote as follows:—“ We beg most distinctly to state, that no further or other answers can be given, your right having been clearly waived, and that your client must adopt the course he may be advised.”

Further correspondence ensued, and the purchaser, on the 23rd of *July*, 1855, required the necessary information and evidence to be furnished within fourteen days, and stated, that if not perfected within that time, he would rescind the contract. The vendors not having furnished

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furnished any further evidence, the purchaser, by letter of the 10th of *August*, rescinded the contract. On the 1st of *November* he brought an action for the deposit with interest and costs; and on the 7th of *December*, 1855, the vendors filed the present bill, praying the specific performance of the contract and an injunction.

Mr. R. Palmer and *Mr. Giffard*, for the Plaintiffs, contended, that time was not of the essence of the contract; that the purchaser's objection was not tenable, and that the contract had not been rescinded.

Mr. Follett and *Mr. Southgate*, contra, contended that the objection was valid, and that after the vendors had positively refused to remedy it, the purchaser was justified in rescinding the contract, and had done so accordingly, after reasonable notice. *Bateman v. Davis* (a); *Heaphy v. Hill* (b); *Watson v. Reid* (c); *Taylor v. Brown* (d); *King v. Wilson* (e); *Benson v. Lamb* (f); *Parkin v. Thorold* (g); *Pegg v. Wisden* (h); *Southcomb v. The Bishop of Exeter* (i), were cited.

Mr. R. Palmer, in reply.

The MASTER of the ROLLS.

This is an unfortunate case, but, as the matter stands, I think that the Plaintiffs cannot enforce a specific performance of the contract.

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| (a) 3 <i>Mud.</i> 98. | (f) 9 <i>Beav.</i> 502. |
| (b) 2 <i>Sim. & Stu.</i> 29. | (g) 16 <i>Beav.</i> 59. |
| (c) 1 <i>Russ. & M.</i> 236. | (h) 16 <i>Beav.</i> 239. |
| (d) 2 <i>Beav.</i> 180. | (i) 6 <i>Hare,</i> 213. |
| (e) 6 <i>Beav.</i> 124. | |

In ordinary cases it is very difficult to make time of the essence of the contract, and when a person gives notice to rescind one, he must, unless the time has already elapsed, give the vendor a reasonable time within which to perform it. If this had been an ordinary case, and the purchaser had said "a further declaration must be obtained, and I give you a fortnight for that purpose," and the Plaintiffs had been unable to get it within that time, I should have thought that a fortnight was not reasonable time. Here the case is very different; more than two months previous to the Defendant's rescinding the contract, the Plaintiffs said, distinctly, that they would give no further answer to the requisition. The case is peculiar; on the 25th of May the Defendant wrote to say, "you have not satisfied my requisitions." The Plaintiffs' answer, on the 31st of May, is this:—"We have and you shall have no further answer." The question, therefore, really depends on whether a good title was then shewn or not, for how long was this to go on? The vendors say, "We have shewn a good title, and will do no more." The purchaser says, "you have not;" and, after notice, rescinds the contract.

I concur with the case of *Parkin v. Thorold* (a), and if the Defendant had said, "if you do not complete within fourteen days I will rescind the contract," that would not have been sufficient. But here, when the vendors had positively refused to furnish any further evidence, I am not clear that any further time was necessary to be given; at all events, I think that fourteen days were sufficient; for it gave the Plaintiffs sufficient time to consider whether they would or not insist that they had shewn a good title; for if they did

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(a) 16 *Beav.* 59.

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so insist, then the purchaser says, "you have not and I will put an end to the contract." It is not, therefore, a question whether the vendors should have more time, but whether they had shewn a good title at this time or not; that is the real issue between the parties. On the 4th of *August*, before the time had elapsed, an answer is sent which removes one of the objections satisfactorily, but the Plaintiffs still insisted that they had shewn a good title.

I see nothing that has occurred since that time which amounts to a waiver of the objection. That brings the case to this:—Was a good title shewn at the time of the notice? If there was, I concur with the Plaintiffs that they are entitled to a specific performance; but if not, then I think they are not entitled, and that, after the delay which had taken place, the Defendant was justified in saying, "complete your title within fourteen days or I will rescind the contract." I look, therefore, to see whether a good title was made. The conditions of sale provided, that the purchaser should be satisfied with a declaration of the seisin of *Elizabeth Gay* in fee simple of the property free from incumbrances for thirteen years from and at the date of her will and at her death. Now, it is not necessary to speculate whether the declaration of *Henry Thomas* would have been sufficient, if he had merely said "that she held it in fee free from incumbrances." I express no opinion whether the Court would consider whether *Thomas* was the proper person to make such a declaration, because the question does not arise, for the declaration is not in the form specified in the conditions of sale, it is this:—[*His Honor read the declaration (a).*]

Here

(a) See *ante*, p. 308.

Here is a declaration by a person competent to speak to the fact of the occupation of her tenant; but as to ~~her~~ seisin "in fee simple of the property free from incumbrances," he states that he has "heard and believes" that she possessed the property as absolute owner in fee simple, and here the declaration stops short, and states who was in possession of the property, leaving it to be inferred that she was in possession of the fee free from incumbrances. But it is expressly conditioned that a declaration shall be made that she was seized free from incumbrances. If it had been intended that the purchaser was to be satisfied with a declaration of occupation, and that the rest was to be inferred, why did not the conditions express it?

I am of opinion that the declaration was not sufficient, and that the purchaser was entitled to a declaration more complete and more full than that of *Henry Thomas*. If so, that settles the question.

It is true that the Defendant insisted on four requisitions, as to which three were removed prior to the 6th of *August*, when the notice expired, and one of which was the consent of Mr. and Mrs. *Beachey*, which was a question of conveyance, and another was unimportant; but the Plaintiffs expressly put the issue on whether a good title was shewn at that time. I find nothing done since to waive the Defendant's right, and I must dismiss the bill with costs.

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Norr  
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## GREGG v. SLATER.

*Feb. 10.*

*A.* mortgaged to *B.*, and the securities were prepared by a firm of solicitors in which *B.* was a partner. The firm acted for the mortgagor. Held, that *B.*'s security did not extend to the bill of costs of the firm.

Pending a foreclosure suit, the mortgagee was fully paid. He, however, made further claims and brought the cause to a hearing. His claim appearing unfounded, he was ordered to pay all the subsequent costs.

**I**N July, 1854, the Defendant *Slater* mortgaged some property to the Plaintiff, *William Gregg*, to secure 253*l.*

The mortgage securities were prepared by Messrs. *W.* and *H. Gregg*, in which firm the mortgagee, *William Gregg*, was a partner, and on the occasion the firm acted for the mortgagor.

The Plaintiff commenced an action at law against the Defendant, and on the 4th of *January*, 1856, he also filed a claim for foreclosure. The Defendant paid the principal and interest on the 10th of *January*, and the costs of suit on the 23rd of *January*. The mortgagee made a further demand of 18*l. 6s. 2d.* for the costs of procuring the loan, and of the preparation, by the firm of which he was a member, of the mortgage securities. The bill of costs for these services was headed, "Mr. *John Slater* to *W. R. and H. A. Gregg*," and contained charges for instructions to obtain loan, preparing and perusing abstract of title, drawing and making fair copy of and engrossing mortgage, attendance, attesting execution of the mortgage by the mortgagor, and registering the document at *Wakefield*.

The mortgagor objected to several items of this bill as excessive, but the mortgagee declined to make any deduction, and the mortgagor refused to pay it. The Plaintiff thereupon proceeded in his claim, which now came before the Court for hearing.

Mr.

**Mr. Follett** and **W. Rowcliffe**, for the mortgagee, contended that the costs in question were mortgagees' costs, for they were payable by the mortgagor, and might be added to and charged upon the mortgage security.

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Mr. R. Palmer and **Mr. Whiteley**, for the mortgagor. The costs in question are not properly chargeable in the mortgage account, or on the mortgaged premises, and payment of them cannot be insisted on as a condition for reconveyance; they could not be claimed under the head of just allowances; and payment of principal, interest and costs of suit was all the mortgagee could require; and having received this, he was not justified in proceeding with the suit. In an action of ejectment at law the mortgagee would have been entitled to redeem under the provisions of the 7 Geo. 2, c. 20, simply upon payment of principal, interest and costs of the action, and the rule is similar in equity.

The Master of the Rolls held, that the costs in question were not mortgagees' costs covered by his security, but costs due from the mortgagor to a firm of solicitors, in which the mortgagee happened to be a partner, and charged by them against the mortgagor.

He directed a reconveyance, and that the Plaintiff should pay all the costs incurred since the payment of the principal, interest and costs.

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*April 16.*

A demand in respect of a breach of trust is barred by the trustee's discharge under the Insolvent Act, if properly inserted in the schedule.

A husband and wife made a post-nuptial settlement of the wife's reversionary chose in action. The wife survived her husband, and it afterwards fell into possession. The wife having done no act to repudiate the settlement— Held, in a suit to charge the trustees with a breach of trust, that it was no answer to say, that the settlement was void as against the *feme covert*.

Two trustees executed a release for trust money, but one alone obtained possession of it, and he invested it on improper security. Held, that the other was liable, for it was his duty to see that it was properly invested.

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BY a postnuptial settlement, dated in 1818, and made between the Plaintiff Mrs. *Thompson*, and her husband Mr. *Thompson* (since deceased) of the one part, and *James Thompson*, and the Defendant *Edward Finch*, of the other part, a reversionary sum of 1,000*l.* part of a sum of 7,000*l.* to which Mrs. *Thompson* was entitled, subject to the life interest of her father, was assigned to *James Thompson* and *Edward Finch*, upon trust for Mrs. and Mr. *Thompson* successively for life, and afterwards for their children. There was a power to the trustees, with consent, to alter or vary the securities for any other real or government securities.

The Plaintiff's husband died in 1828. *James Thompson*, the trustee, died in 1838, and, in 1841, *John Hayward*, (an attorney,) was, under a power contained in the settlement of 1818, appointed a new trustee in his place.

The tenant for life of the 7,000*l.* died on the 2nd of April, 1842, whereupon the 1,000*l.* became payable. On the 17th of May, 1842, *Hayward* and *Lake* (the trustees of the 7,000*l.*, which was standing in their names in the funds) raised the sum of 1,000*l.*, to answer the 1,000*l.* which was subject to the trusts of the settlement of 1818 ; and, on the same day, a release

release was executed, dated the 17th of *May*, 1842, whereby *Finch* and *Hayward* (as trustees of the settlement of 1818) acknowledged the receipt of the sum of 1,000*l.* from *Hayward* and *Lake*, and released *Lake* from all suits and demands in respect thereof.

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There was another sum of 500*l.* in question in this suit, in respect of which the following statement is necessary:—The Plaintiff's father, by his will, directed his executors (*Hayward* and *Edward Finch*) to appropriate and set apart a sum of 500*l.* upon trust to invest in the public funds or real securities, and stand possessed thereof, in trust for the Plaintiff Mrs. *Thompson* for life, with remainder to her children.

In 1842, *Hayward* and *Edward Finch* accordingly, shortly after the testator's death, raised this legacy of 500*l.* by the sale of some Three-and-a-quarter per Cents.

Both these sums of 1,000*l.* and 500*l.* were received by *Hayward* alone, and were never properly invested by him, but were lost under circumstances presently stated.

The Plaintiff agreed that these sums should be laid out on real security. *Hayward*, at this time, had a client, Sir *John K. Shaw*, for whom he had raised large sums of money, and who was then indebted to him in 10,000*l.* *Hayward*, on the 7th of *July*, 1842, charged himself in his books with 1,500*l.*, and credited the account of Sir *J. K. Shaw* in these terms:—"By cash, *M. Thompson*, on mortgage, 1,500*l.*;" and he applied the same, with other monies, to Sir *J. K. Shaw's* use.

In 1843 and 1847, Sir *J. K. Shaw* executed a mortgage

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gage to *Hayward* for a large sum, which included, though not specifically, the 1,500*l.*; but, in 1848, *Hayward* joined in a conveyance of these estates in such a way as to give priority to other mortgagees of Sir *J. K. Shaw's* estates.

In 1849, Sir *J. K. Shaw* executed a mortgage to *Hayward* alone for 25,900*l.*, subject to prior mortgages, and this included the 1,500*l.* On the day following, *Hayward*, by deed poll, executed a declaration of trust as to 1,500*l.*, part of the 25,900*l.*, in favour of the Plaintiff and the parties entitled under the settlement of 1818.

*Finch* did not appear to have interfered in these matters, but *Hayward* paid to the Plaintiff interest on the 1,500*l.* at 5*l.* per cent. up to 1849, when he reduced the interest to 3*l.* per cent., and he paid further moneys on account down to 1854.

In 1852, *Hayward* took the benefit of the Insolvent Act, and included the debt of 1,500*l.* in his schedule, and *Finch* being served with notice, gave notice of opposition to his discharge, in respect not only of his own debt, but of the 1,500*l.* claimed by this suit. *Hayward* made the Plaintiff some small payments afterwards; but Sir *J. K. Shaw's* security turned out valueless, and nothing was recoverable under the insolvency of *Hayward*.

The present suit was instituted by Mrs. *Thompson* alone against *Finch* and *Hayward* (the trustees), the assignees of *Hayward*, and the other parties beneficially interested, seeking to make both the trustees replace the trust fund.

The Defendant *Finch*, in his evidence, said, that *Lake* and *Hayward* raised the 1,000*l.*, and, being in the

the hands of *Hayward*, it was retained by him, without *Finch's* knowledge or privity, but, as *Hayward* subsequently stated, with the consent of the Plaintiff, and in order to its investment in real estate. He said he had no recollection of ever having joined in a receipt or release for the 1,000*l.*, and he believed that he never did so, but that if he ever did, he did so at the request of *Hayward*, and for the sake of conformity merely. He said that the 1,000*l.* was never received or invested by him, but that *Hayward* had informed him, shortly after he had received it, that he duly invested it at the request of the Plaintiff, upon a sufficient mortgage of the real estates of Sir J. K. *Shaw*. That he never interfered or acted in any way, nor had he ever been requested by the Plaintiff to interfere, or act in the trust.

He said, that in *May*, 1842, he had concurred in raising the 500*l.* to satisfy the Plaintiff's legacy, and that *Hayward* represented, that the Plaintiff had requested him to invest it upon real security, rather than in the other securities pointed out by the said will, as she would thereby receive a larger annual income, and *Hayward* then, for the first time informed him, that he had, at the instance of the Plaintiff, lent the 1,000*l.* to the said Sir J. K. *Shaw*, on mortgage of his estates, and that the 500*l.* would be forthwith invested by him on the like security. That, upon these representations of *Hayward*, who was a solicitor of great reputation, and at this time universally respected, he did not interfere with the receipt of such proceeds by *Hayward*, who subsequently informed him that he had invested the 500*l.* on mortgage of the estates of Sir J. K. *Shaw*, and who thenceforth paid the interest thereon, and that he never had the least suspicion until the year 1850, that

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the sums of 1,000*l.* and 500*l.* had not been invested upon a regular and formal mortgage of the real estates of Sir J. K. Shaw.

On the other hand, the Plaintiff, in her affidavit, stated, that in 1842, *Hayward* told her that he had an opportunity of greatly benefiting her by placing out her money on mortgage, on good security of landed property, and that Mr. *Finch* had placed his money on the same estate. That she then asked the name of the proposed borrower, but he said he was not at liberty at present to tell her. She said she had no objection to the investment on mortgage on good security, but that she had never authorized *Hayward* to lend the money to Sir J. K. Shaw. That several months afterwards an interview took place between her and *Edward Finch*, and she then informed *Edward Finch* of the application made by *John Hayward* for her to invest the money, and inquired of *Edward Finch* whether he had the security relative to her money, when he replied that he had not such securities, neither had he ever seen them, but that he had his own securities, and he requested the Plaintiff's daughter to go to *Hayward* and ask for the papers, whereupon the Plaintiff suggested, that he, *Edward Finch*, was the proper person to go, and she urged his doing so, on that and other occasions when the subject was mentioned. She said that she was not aware, until two years afterwards, of the name of the borrower, when *Finch* told her of the borrower of the money lent by him, nor was she aware that her trust money had been, as alleged by *John Hayward*, lent to Sir J. K. Shaw, until at least two years after the application of *John Hayward* for her consent to invest the same, when *Edward Finch*, at his then residence at *Gravesend*, produced to her a bundle of

of papers and stated that his money was lent upon the estate of Sir J. K. *Shaw*, and that he understood from *Hayward* that the Plaintiff's money was upon the same estate.

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The cause now came on for hearing.

*Mr. R. Palmer* and *Mr. Shebbeare* for the Plaintiff, argued, that the trustees having both received the trust funds, and having invested them on an improper security, without the necessary assent and in the name of one, were liable for the loss. That *Finch* was bound by his acceptance of the trust, and the release of 1842 executed by him, and that *Hayward* was not discharged from his liability, by taking the benefit of the Act; *Buckeridge v. Glasse* (a).

*Mr. Bagshawe* and *Southgate* in the same interest.

*Mr. Follett* and *Mr. Osborne* for *Finch*. The settlement of 1818 was postnuptial and comprised a mere reversionary interest of the wife. The settlement, therefore, and the trusts contained in it, were not binding on her, she having survived her husband. On the death of her husband in 1828, she then became absolutely entitled to the 1,000*l.*, and capable of dealing with it as she pleased, discharged of every trust; and she did nothing until 1842 (b), when the money was received. Every act done by her, while *sui juris* and absolutely entitled to the fund, bound her, and if she permitted *Hayward* to deal with it, she had a right, as the absolute owner of it, to do so, and *Finch* had no fiduciary duties to perform in respect of that absolute interest. The Plaintiff is bound by her concurrence in what has taken

(a) *Craig & Ph.* 126. (b) *Honner v. Morton*, 3 *Russ.* 65.

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taken place, she had the same knowledge and the same power and duty of interfering as *Finch*, and she, therefore, has no reason to complain of any neglect.

*Finch* received no part of the 1,000*l.*, he executed the release under a misapprehension, and is not liable for the receipts and defaults of *Hayward*.

The Plaintiff, having for a long period of years acquiesced, cannot now charge an innocent trustee.

They cited *Townley v. Sherborne* (*a*) ; *Langford v. Gascoyne* (*b*) ; *Brice v. Stokes* (*c*) ; *Walker v. Symonds* (*d*).

Mr. *Fooks* for *Hayward* and his assignees. The discharge of *Hayward* under the Insolvent Act is a bar to this suit and he ought not to have been made a party.

[*The Master of the Rolls*, I cannot make a personal decree against *Hayward*, but he is a necessary party to the suit, for he still remains a trustee.]

Mr. *Fooks*, this is not a case in which a trustee has put the trust money into his own pocket, but it has been lost by misfortune and by the inadequacy of the security. These parties ought, therefore, to have their costs.

#### *The Master of the Rolls.*

This is a very painful case, but, in the view I take of it, it is one of ordinary occurrence in cases of breaches of

(*a*) *Bridg.* 35.  
 (*b*) 11 *Ves.* 335.

(*c*) 11 *Ves.* 324.  
 (*d*) 3 *Swanst.* 1.

of trust. The authorities cited and the arguments used, on the part of Mr. *Finch*, have confirmed me in the view I took as to his liability as soon as I was acquainted with the facts.

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In the first instance, I assume the validity of the trusts of the deed of 1818. Mr. *Finch* accepted the trust, he executed the deed, he knew that he was a trustee, and he knew that upon the death of the Plaintiff's father 1,000*l.* was to come under the trusts of the deed; he knew also that Mr. *Lake* would not pay that sum without a release being executed. I find also a release executed by him upon a payment expressed to be made by *Lake* and *Hayward* to *Hayward* and himself. It is therefore impossible that I can allow him to say, that a fraud was perpetrated against him with respect to the deed, and that he did not know what the contents were of the deed which he executed, and to say this, for the first time, after this suit had been instituted, he never having made any remark upon the matter previously.

It is obvious therefore, that those cases of *Townley v. Sherborne* (*a*), and *Langford v. Gascoyne* (*b*), the authority of which cannot be doubted, establishing that a trustee would be liable for his own receipts only, do not apply to a case where a trustee assists or enables another trustee to receive the money. In fact that is the very point established in *Langford v. Gascoyne*. In that case, the money was to be received by one, but he caused it to be delivered to another, and therefore he was held to be liable as a receiving party. Accordingly I asked Mr. *Osborne*, if he could give me any evidence to shew that this money was actually received

(*a*) *Bridg.* 35.

(*b*) 11 *Ves.* 335.

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received by Mr. *Hayward* previous to the execution of the release. He admitted that there was no such evidence, but, on the contrary, that it must be admitted, that *Lake* paid the money on the receipt of the two, for he knew that he could not safely pay it unless upon the receipt of both trustees. It is obvious that *Finch* perfectly well knew of this transaction immediately afterwards, for, according to his own statement, *Hayward* came to him immediately afterwards, and informed him of this conveyance of the 17th of *May*, 1842, and visited him about nine or ten days afterwards, on the 26th of *May*, and then informed him, that he had invested the money on the security of Sir *John Shaw's* estates with the consent and by the desire of the Plaintiff, and that is the case he relies upon. *Finch* says, that being dissatisfied with their acting in the matter without his consent and without his control, he went and complained to the Plaintiff of her conduct, and this created some coolness.

Mr. *Follett* puts, in very broad terms, an argument to this effect:—he says the Plaintiff, Mrs. *Thompson*, knew perfectly well what was done, and therefore she is liable; that Mr. *Finch* did not know it a bit better than she did, and that therefore he is no more liable than the Plaintiff. Now that is a misapprehension of the duties and the situation of the trustees and the *cestui que trust*.

It is an undoubted proposition in this Court, established not merely by *Brice v. Stokes* (a), but many other cases, that if a *cestui que trust*, being *sui juris*, having a knowledge of the breach of trust by a trustee, assents to it, or takes no steps to obtain redress for a long lapse of time, he cannot afterwards complain of the

(a) 11 *Ves.* 324.

the breach of trust sanctioned by him, and of which for a great length of time he had not thought fit to complain. But here the case made is not one of notice to the Plaintiff of a breach of trust, but of its performance, because the settlement authorized the lending the money on real security, with the consent of the Plaintiff, and she assented to it. Accordingly, that which is brought forward as making out the case of the Defendant, appears to me to strengthen and confirm the case of the Plaintiff, namely, that she gave all the receipts to *Hayward*, as receipts for interest paid by Sir *John Shaw* on the 1,500*l*. advanced to him upon the security of his real estates.

*Mr. Follett* says, but *Mrs. Thompson* knew this, and *Finch* knew no more; they were equal in their knowledge; and that, therefore, she cannot complain. But that is forgetting what were the duties of a trustee. *Finch* accepted the trust, and it was his duty, with the consent of *Mrs. Thompson*, to lay out the money on real or government security. He is told that it has been done, but does that exonerate him from seeing that it was done?—Certainly not. It was suggested that *Mrs. Thompson* never went to *Finch* or told him to inquire into the matter; but there is evidence, not contradicted by him, that she did do so, and that she suggested, in the presence of *Mrs. Bliss*, that he had better go to *Hayward* and see what the securities were. Even if she had not done so, she is not to be prejudiced: it is not the business of a *cestui que trust* to inform a trustee of his duty. It was his duty, without any request, to see that the money had been laid out on proper and sufficient security. Probably everybody trusted *Hayward*, who was then in good circumstances and credit, and *Finch* believed that every thing had been properly done; but that does not exonerate him,

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the trustee, who has signed the release, from seeing that the money had been properly invested on real security, which it was his duty to do.

If the fact had been, that the money had been received by Mr. *Hayward*, and that he had never pretended that he had invested it, but had from time to time told the Plaintiff that he would invest it, and she had given receipts for the interest for fourteen years, I should have entertained very serious doubts whether she could have complained, because she would then have had knowledge of a breach of trust committed by the trustee. But, on the contrary, the statement made by Mr. *Hayward* is, that he did duly invest the money; that statement was false, and it was the duty of the co-trustee to ascertain the correctness of it and to see that it had been done.

The case of *Walker v. Symonds* (a) was referred to. Now, leaving out of consideration, for the present, whether there was any original liability in *Finch*, in allowing *Hayward* to receive the money, Lord *Eldon* expressly lays down, in that case, that if trustees allow trust money to remain for a great length of time uninvested, they are liable; but that he would not make them liable, if, when they became trustees, they have cognizance of an antecedent breach of trust committed by others, and take every step they can, short of instituting a suit in this Court, to put the matter right. But when a person is made a trustee, and there being 1,500*l.* in the hands of his co-trustee, he is told that the money is properly invested, would that be a sufficient answer for the trustee to say, that he was satisfied with that statement, though for a series of ten years he had

(a) 3 *Swanst.* 1.

had taken no steps to ascertain whether it was true? I apprehend that he would not be justified in that, and that it was his duty to see that the money had been duly invested according to the trusts of which he had undertaken to perform, and that if he allows the matter to go on for a long series of years without having verified the truth of the statement, this Court, whatever regret it may feel under the circumstances, must make him liable for it.

The result is deeply to be regretted, for it is quite clear that *Finch* is perfectly free from all improper motive, yet he has undertaken to perform a trust and has not performed it.

I may dismiss altogether the consideration of the absolute power of the Plaintiff over the fund after her husband's death, because assuming, for the purpose of argument, that she had such power, still she never exercised it after the death of her husband in 1828; she never said that this fund should not be subject to the trusts of the settlement, but, in 1842, she still treats *Finch* as a trustee under the existing deed. It is impossible to say, that she did not sanction the deed after becoming discovert and mistress of the fund, and thereby make the instrument and the trusts in it valid.

It is, therefore, with great regret I feel myself compelled to make a decree for the restitution of the 1,500*l.*; but I must give *Finch* leave to go in under the insolvency and to prove for the amount against *Hayward's* estate.

I shall not give Mr. *Hayward's* assignee any costs, and I cannot make him pay them.

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There is no fixed meaning to be given to the word "unmarried." Its construction depends on the circumstances and on the position of the party to whom the term is applied.

The words "unmarried" or "without having been married," when used in a settlement and applied to the wife, are intended merely to exclude the marital right, and not to defeat any interest which the

children might otherwise be entitled to as next of kin of their mother.

By a marriage settlement, the ultimate trust of some money, after failure of issue and in default of appointment by the wife, was to such persons as would have been entitled to the personal estate of the wife under the statute "in case she had died unmarried and intestate." Held, that "unmarried" must be construed as meaning "not under coverture at the time of her death."

It is settled, that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; but it is not settled whether a gift can be made to the future illegitimate children of a woman.

Illegitimate children cannot take under a gift to a class of children, unless it is clear that the legitimate children never could have taken under the gift.

A testator having married his deceased wife's sister, and while living with her as his wife, made his will, whereby he gave all his real and personal estate "to my wife" for life, and after her death, upon trust "for all and every my children hereafter to be born." At the date of the will, the testator had no children whatever, but two days after, a son was born. Held, that the gift "to my wife" was good, but that the son could not take under the gift to his children "hereafter to be born."

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The

The wife died in 1850, in the lifetime of her husband, having had three children, who all died in infancy, and without attaining vested interests in the trust fund. Two of them died in her lifetime, and the third, *Jane*, survived her and died a few weeks after. Mr. *Pratt* died in 1852. Neither of the powers contained in the settlement was ever executed, and a question arose, whether, under the ultimate limitation, the trust fund had passed to *Jane Pratt*, the child, as next of kin of Mrs. *Pratt*, or to the brothers and sisters of Mrs. *Pratt*, who would have been her next of kin if she had died without having been married.

Upon these facts a special case was stated for the opinion of the Court, as to what was the true construction of the word "unmarried" in the ultimate trust in the settlement.

The surviving brother and sisters of Mrs. *Pratt*, and the children of her deceased brother and sisters, claimed to be entitled to receive the trust fund, as being the only persons who answered the description of the persons contained in the ultimate trusts thereof.

On the other hand, the executors of Mr. *Pratt* alleged, that on the death of Mrs. *Pratt*, her surviving child, *Jane Pratt*, was the only person at that time answering the description of persons contained in the settlement, and that, consequently, she became absolutely entitled to receive the trust fund, and that upon her death, intestate, her father, Mr. *Pratt*, became entitled thereto, as her sole next of kin. The executors claimed to be entitled to receive the trust fund as part of his estate.

Mr. *Lloyd* and Mr. *Hanson* for the Plaintiffs, who were both executors of Mr. *Pratt* and representatives of

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of *Jane Pratt*. The object of the ultimate limitation contained in the settlement was, to prevent the marital right from attaching to the fund, in case the wife should make no appointment, and therefore the construction must be such as to effect that intention and carry it out in all its legal consequences. The construction of the word "unmarried" is *vexata quæstio*, but here it cannot mean "never having been married," but "being in a discovert state." In *Hoare v. Barnes* (a), the trust fund, by a marriage settlement, was limited, in default of appointment by the wife, to such person as the same would have gone unto by the Statute of Distribution, in case the wife had died unmarried. The wife died without appointing, leaving a daughter, who took the fund as next of kin. The word "unmarried," in a marriage settlement, cannot mean "not having been married," for the deed is only intended to operate in case the then intended marriage takes effect; it must mean "in a state of discoverture at the time of the death;" the intention is to exclude the husband, and the word "unmarried" must be construed with reference to that to which it is put in opposition. The child, *Jane Pratt*, who survived her mother, took the fund, and on her death Mr. *Pratt*, as her next of kin, became entitled to it. They cited *Doe d. Baldwin v. Rawding* (b); *Bell v. Phyn* (c); *Hardwick v. Thurston* (d); *Maughan v. Vincent* (e); *Re Norman's Trust* (f); *Re Thistlethwayte's Trusts* (g); *Coventry v. Lord Lauderdale* (h); *Withy v. Mangles* (i); *Smith v. Smith* (k).

Mr. *Rouppell* and Mr. *Archibald Smith*, for the brothers

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| (a) 3 Br. C. C. 316. | (g) 1 Jur. (N. S.) 570; 24
<i>Law J. (Ch.)</i> 712. |
| (b) 2 B. & Ald. 441. | (h) 10 Jur. 793. |
| (c) 7 Ves. 453. | (i) 4 Beav. 358. |
| (d) 4 Russ. 380. | (k) 12 Sim. 317. |
| (e) 9 Law J. (N. S.) Ch. 329. | |
| (f) 3 De G., M. & G. 965. | |

brothers and sisters of Mrs. *Pratt*, other than *Susan Broom*. The word "unmarried" means "never having been married." The construction to be put upon the term depends upon the intention of the instrument in which it is contained, and here the parties really meant, "not having been married;" *Maberley v. Strode* (*a*). The settlement itself, in this case, clearly shews that such was the meaning and intention of the parties, for though there is a very careful provision for children, it is made to depend upon their attaining twenty-one, or as to daughters being married. The limitation in question is only to take effect after the children have been provided for to the full extent expressed in the settlement.

Mr. *Shapter*, for other Defendants in the same interest, cited *Richardson v. Richardson* (*b*), the marginal note to which he said was erroneous, and *Horn v. Coleman* (*c*).

Mr. *R. Palmer* and Mr. *Fisher* concurred in the Plaintiff's argument as to the construction of the word "unmarried."

The Master of the Rolls.

I think the authorities are too strong to be got over, and particularly the case of *In re Norman's Trust* (*d*). They lay down a distinct and definite rule on the subject. It is obvious that the term "unmarried" has a different signification, according as it is applied to a person who is married or unmarried at the time. If there be a gift to a woman who is unmarried at the time, with a direction that if she dies unmarried it is to go over, it is quite settled that "unmarried" is to be construed "never having been married." On the other hand,

(*a*) 3 *Ves.* 450.

(*b*) 14 *Sim.* 526.

(*c*) 1 *Sm. & G.* 169.

(*d*) 3 *De G., M. & G.* 965.

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hand, if there be a gift to a woman who is married at the time ; "but, if she shall die unmarried, then over," it is obvious that the word "unmarried" may be held to mean "not being in the state of marriage at the time of her death." The word "unmarried," therefore, does not necessarily mean "without having been married," and no fixed meaning can be assigned to it, but it must be determined according to the circumstances of the case.

Here a fund is settled in contemplation of marriage, upon a woman and her issue, with a direction, that in a certain event, it shall go to her next of kin, in the same manner as if she had died *unmarried and intestate*. It is clear that this may mean either "as if she had never been married," or, "as if she were not then under *coverture*." The cases of *Hoare v. Barnes* (a); *Hardwick v. Thurston* (b); and *Maughan v. Vincent* (c), are strong authorities in favour of this latter view of the case. They all shew clearly that the words "if she shall die unmarried and intestate" will not exclude her issue. In those cases, undoubtedly, there was no provision for children, as there is here by this settlement; but, in all of them it was distinctly laid down, that the expression "unmarried" was not synonymous with the words "not having been married," but might also mean "not being in a state of *coverture* at the time of her death." It seems to me, indeed, difficult to understand why these words are to bear a construction in the one case different from that in the other. It is true, that if children are provided for by the settlement, it may be in such a manner that they could take no interest whatever in the event of the mother dying unmarried and intestate,

because

(a) 3 Bro. C. C. 316.
(b) 4 Russ. 380.

(c) 9 Law J. (N. S.) Ch. 329.

because the interest previously given to them by the settlement might exhaust the whole estate. For instance, if it was provided that the children should attain a vested interest immediately upon their being born, it is clear that they could not be intended to take an interest under a limitation which takes effect only in the event of failure of issue, in which case it is to go to the next of kin as if the mother had died unmarried and intestate. But, wherever the prior limitations are of a different nature, and such as to enable the children to take, then the question arises whether the children are excluded, or are entitled to take, and whether it is intended that only the marital right of the husband should be excluded. This question arose in the case of *In re Norman's Trusts* (a), which is binding upon me. Here the fund is not exhausted, for the gift is to sons at twenty-one, and daughters at twenty-one or marriage.

Undoubtedly, in the present case, by taking the second view of the question, the father indirectly gets the benefit of the limitation over, he being the sole next of kin of the infant daughter, who died soon after her mother; but although some importance may be attached to that circumstance, I am of opinion that the construction is not to be governed by the event, and that I cannot, on that account, put a different construction upon the words. What might have been the intention of the parties, in every possible event that might arise, it is not for me to speculate upon, and I can only collect the intention from the words of the settlement. In all the cases where a settlement provides, that in a certain event, the property shall go over to the next of kin of the wife in the same manner as if she had died unmarried and intestate, it has been held "that the marital right only

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(a) 3 *De G., M. & G.* 965.

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only is excluded, and not the right of the children ; and I think I should be making an unsound distinction, if I held that the meaning of the words depended upon the fact of there being, in the instrument, any previous provision for the children, or if I took into consideration the amount of such provision, which would involve details of great difficulty and render these cases more obscure than they are at present. In my opinion, therefore, the proper construction to put upon the word "unmarried," is to exclude the marital right, but not any interest which the children might be entitled to ; and in this settlement it must be construed as meaning "not under coverture at the time of her death," and the fund must go to the legal personal representative of the only child who survived the wife, that is the husband.

A second question arose under the following circumstances :—"In 1843, Mr. *Pratt* married *Eliza Wood*, who died in 1850, and in 1851, Mr. *Pratt* married *Susan Broom*, his deceased wife's sister, and he lived with her as his wife until his death, though, in fact, the marriage was void under Lord *Lyndhurst's* Act, 5 & 6 Will. 4, c. 54.

On the 16th March, 1852, Mr. *Pratt* made his will, *Susan Broom* being then in an advanced state of pregnancy, whereby he gave his real and personal estate to trustees to sell and convert and pay the interest of the monies arising from the sale "to my wife," during her life, and after her decease, to stand possessed of the trust funds "for all and every my children hereafter to be born, on their attaining the age of twenty-one years, or day of marriage," with benefit of survivorship, and in default of children, then to the testator's next of kin.

On

On the 18th of *March*, 1852, the testator had a son born to him by *Susan Broom*; and in *April*, 1853, the testator died, leaving *Susan Broom* and the son named *Richard* surviving.

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Upon these facts a second question arose, on this special case, as to the true construction of the words "my wife" and "my children hereafter to be born," contained in the will of the testator.

Various claims were made by the Plaintiff and Defendants in respect of the residuary estate of Mr. *Pratt*. The Plaintiff, the executors of Mr. *Pratt* and of his father, alleged that the provision made by Mr. *Pratt's* will for his wife and children had failed, by reason that when he died, there were not in existence any persons answering, in point of law, the description of "my wife" and "my children," and that his will furnished no sufficient evidence of any intention, on his part, to comprise, under that description, any person or persons except such as would legally answer thereto. They contended, that his father became entitled to the residue under the ultimate trust contained in his son's will, as being his sole next of kin at the time of his death. The Defendant, *Susan Broom*, (otherwise *Pratt*,) alleged, on the other hand, that she and her infant son were the persons meant by the description of "wife and children" contained in the will, and that they were entitled to the benefit thereby provided for his wife and children.

Mr. *Lloyd* and Mr. *Hanson* for the Plaintiffs. There was no person at the date of the testator's will or at his death, who, in contemplation of law, answered the description of "my wife." It is highly probable that the testator meant his reputed wife, but that is not the

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legal construction of the term "wife" which means the character not the person. [*The MASTER of the ROLLS*. No doubt the testator meant the lady with whom he went through the form of marriage. If a man had committed bigamy, there would be no doubt that if he left a bequest to his wife, the first and real wife would take it; but if there was no person else at all except the reputed wife as here, would he not mean the person whom he calls his wife? Suppose a man had called a child of a friend "my little wife," and having no wife had left a legacy to "my little wife," would not that be a good gift?] True, but that would be a description of the person. A gift to "children" would not include illegitimate children, and in all the cases in which a reputed wife has taken, there has been a superadded expression to the term "wife," such as the name of the wife or some expression of endearment, as "my dear wife," pointing to a particular person; but in no case has this been so where, as here, there are merely these words "my wife," which point to the character of wife, not to individuality of person. In *Kennell v. Abbott* (*a*), a gift to a man by a woman who believed him to be her husband, and described him as such, though in fact at the time of the marriage ceremony with her he had a wife living, was held to fail. [*The MASTER of the ROLLS*. That was not on the construction of the words, but on the ground of the fraud.] In the case of *Schloss v. Stiebel* (*b*), a testator who was betrothed to a lady and intended to marry her in a few days, by a codicil to his will, mentioning the lady's name and alluding to his intended marriage with her, gave 3,000*l.* to "his wife," and died before the marriage; and it was held, that the lady was entitled to the legacy. But that was merely calling a person his "wife" by anticipation,

(*a*) 4 *Ves.* 802.

(*b*) 6 *Sim.* 1.

pation, who was otherwise particularly designated by him. But where you say "wife" simply, you mean lawful wife. So in *Doe d. Gains v. Rouse* (a), the testator devised to "my dear wife Caroline," and she took though not his wife. They cited also on this point *Wilkinson v. Adam* (b); *Dover v. Alexander* (c); *Giles v. Giles* (d); *In re Davenport's Trust* (e).

On the question of the construction of "my children hereafter to be born," they cited *Bayley v. Snelham* (f); *Arnold v. Preston* (g); 2 *Jarman on Wills* (h).

Mr. R. Palmer and Mr. Fischer for Susan Broom and Richard her son. The lady called by the testator "my wife," could take by that description; *Garratt v. Niblock* (i); *Schloss v. Stiebel* (k). As to the children, whatever might be the construction as to the children not in *esse*, the child of which this lady was *enceinte* at the date of the will, and who was born two days afterwards, is clearly entitled to take; *Gabb v. Prendersgast* (l); *Earle v. Wilson* (m); *Gordon v. Gordon* (n); *Evans v. Massey* (o); *Dover v. Alexander* (p); *In re Connor* (q); *Mortimer v. West* (r).

#### *The MASTER of the ROLLS.*

I entertain no doubt that when the testator gave certain property "to my wife," he considered that there

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| (a) 5 C. B. 422.                     | (i) 1 Russ. & Myl. 629.   |
| (b) 1 Ves. & Beam. 422, 465;         | (k) 6 Sim. 1.             |
| 12 Price, 470.                       | (l) 1 Kay & J. 439.       |
| (c) 2 Hare, 275.                     | (m) 17 Ves. 528.          |
| (d) 1 Keen, 685.                     | (n) 1 Mer. 141, 145, 152. |
| (e) 1 Smale & G. 126.                | (o) 8 Price, 22, 31.      |
| (f) 1 Sim. & Stu. 78; 5 Ves. 534, n. | (p) 2 Hare, 275.          |
| (g) 18 Ves. 288.                     | (q) 2 Jones & Lat. 456.   |
| (h) Page 197 (2nd edit.)             | (r) 3 Russ. 370.          |

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there was some person who could take under that designation. He could not be referring to any future wife he might marry, for a subsequent marriage would revoke the will. Then it appears from the evidence, that he had gone through the ceremony of marriage with the sister of his deceased wife, whom he could not legally marry, but that he called her his wife, and treated her as such. I consider that there is a good designation of her, and that it is the same as if he had called her *Susan Broom*; I am of opinion that she takes under the bequest. I alluded, in the course of the argument, to what not unfrequently happens of a man calling a child "my little wife," in which case the child would, undoubtedly, take a legacy under that designation, provided the testator left no wife. I think that *Susan Broom* takes a life interest under this will in the property.

Upon the question as to the gift to the children, I wish to hear a reply.

Mr. *Lloyd* in reply.

*The Master of the Rolls* reserved judgment.

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March 17.      *The Master of the Rolls.*

The point in this special case on which I reserved my judgment, is the second question, as to the true construction to be placed on the words in the will of the testator which refer to "his children thereafter to be born." The facts are very simple:—in *May*, 1851, the testator performed the ceremony of marriage with a sister of his deceased wife. On the 16th of *March*, 1852,

1852, when she was in a far-advanced state of pregnancy, in fact only two days before the birth of a son, he made his will; by it he gave some specific legacies and subject thereto he gave all his real and personal property to trustees, in trust "to convert and invest and pay the dividends half-yearly to my wife during her life for her sole and separate use, and after her decease" in trust "for all and every my children hereafter to be born."

At the time of the argument, I expressed my clear opinion, that the words "my wife" were a *designation* of the lady with whom he was living as his wife, and with whom he had gone through the ceremony of marriage.

But a greater difficulty arises as to the words "my children hereafter to be born." It is quite settled, that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute. It is not necessary to consider whether a gift to the illegitimate children of a woman is valid:—that has never been determined.

It is also clear, that illegitimate children cannot take under a gift to children, unless it be quite clear, on the face of the gift, that legitimate children never could have taken under the gift. This, it is obvious, is not the case here; the gift is to "my children hereafter to be born," this would obviously include the children he might have by any subsequent marriage.

But it is contended, that this is a designation of the child then about to be born, and it is undoubtedly true, that a child in *ventre sa mere* may acquire a name by reputation,

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reputation, although illegitimate. But, with much regret, I have found myself obliged to come to the conclusion, that this is not such a description of this child then about to be born, as will enable it to take. I look in vain to find any words which point out an express description of such child. If I found any words in the will importing a child then in *esse* or about to be born, I should be able to say that this was a description of the child ; this is not so, and there are no words in the will which point to this particular child, it is nothing more than the description of a class. It is true that if this had been the case of a valid marriage and a legitimate child, those words would include the child in existence, and thence it is argued, that it will include the illegitimate child in existence when the will was made. But the objection to this is :—that the legitimate child, in the case supposed, would take only as one of a class, and that if the illegitimate child takes by analogy to that rule, he must also take as one of a class, but the class of which he is to form one is “ my children hereafter to be born,” which extends only to legitimate children and excludes illegitimate.

It is with much regret, therefore, that entertaining no doubt of what the real intention of the testator was, I feel myself bound to come to the conclusion, that he has not expressed that intention in such a way, as, having regard to the rules of law, relative to illegitimate children, this Court can give effect to.

I do not proceed upon *Earle v. Wilson* (a), or found my judgment upon that case, but solely on the ground that there has not been a sufficient description of the child

(a) 17 Ves. 528.

child in existence, except as one of a class, from which he would be, by law, excluded.

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I will therefore answer the second question accordingly; the first I disposed of at the hearing, viz. that the word "unmarried" meant "discovert."

Note.—Some of the Defendants appealed to the Lords Justices as to the construction of the word "*unmarried*." Their Lordships, on the 21st July, 1856, dismissed the appeal with costs.

THOMAS v. THOMAS.

Feb. 18.

IN 1848, *Morgan Thomas* demised certain hereditaments to the Plaintiff, *Jacob Thomas*, for a term of 500 years, by way of mortgage, to secure the sum of 80*l.* lent to him by the Plaintiff. Subsequently, the Plaintiff advanced to the mortgagor sums amounting in all to 38*l.* without taking any security. The mortgagor had commenced building two new houses on the premises, but died before completing them and after his death, the Plaintiff laid out 36*l.* 11*s.* 2*d.* in completing.

A mortgagee may tack simple contract debts to his mortgage as against the heir where the property descended is assets in his hands for payment of simple contract debts, and consequently since the stat. 3 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debt as against the heir.

The mortgagor died in 1850 intestate, leaving the Defendant, *John Thomas*, an infant, his heir-at-law.

The Plaintiff filed his bill for foreclosure, praying an account of what was due for principal and interest on the mortgage, and in respect of the advances, and the sums expended in completing the premises.

The cause came on to be heard on motion for a decree.

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Mr. *Wickens* for the Plaintiff. The Plaintiff is entitled, as against the heir, to tack his simple contract debt to his mortgage, and be paid both upon a redemption. It was decided in *Rolfe v. Chester* (a), "That since the 3 & 4 Will. 4, c. 104, a mortgagee of copyholds may tack a simple contract debt to his mortgage debt, as against the customary heir or devisee, but not as against specialty creditors. It seems also, that a mortgagee may tack a simple contract debt to his mortgage debt, as against the heir, devisee, or executor, wherever the equity of redemption is assets in their hands for payment of simple contract debts."

This decision proceeded on *Coleman v. Winch* (b), and the point is mentioned in 5 *Jarm. Byth. Conv.* (c). If the mortgagee of a chattel real can tack a simple contract debt against the executor, it would be difficult to see any distinction between that and tacking against the heir, where the descended estate is liable for the payment of the simple contract debt. In *Price v. Fastnedge* (d), it was held, that the executor of a mortgagee, who had advanced a further sum, might, if the lands were charged with or devised for payment of debts, tack as against the heir or devisee of the mortgagor. Here the statute makes the lands assets for payment of debts.

Mr. *J. H. Taylor*, for the infant heir, objected that there was no personal representative of the mortgagor before the Court, and there might be personality enough for payment of the simple contract debts, in which case there would be no necessity for tacking. The existence of a simple contract debt is not disputed ; it is proved ; but this

(a) 20 *Beav.* 610.  
 (b) 1 *P. Wms.* 775 ; *Prec.*  
 Ch. 511.

(c) Page 440 (3rd edit.)  
 (d) *AmbL* 685.

this is an attempt to make the heir pay it instead of the executor.

**Mr. Wickens.** The present question is purely between the mortgagor and mortgagee.

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I considered the point carefully in *Rolfe v. Chester* (*a*), and was of opinion that the judgment in *Coleman v. Winch* (*b*), and the principle there laid down by Lord *Macclesfield* applied to cases within the statute 3 & 4 *Will. 4*, c. 104, and that as soon as that statute made real estate assets in the hands of the heir for payment of simple contract debts, the mortgagee might tack against the heir. I will again look at the Statute and the authorities, but unless I state a change of my opinion, I will so decide.

The case was not mentioned again.

(*a*) 20 *Beav.* 610.

(*b*) 1 *P. Wms.* 775; *Prec. Ch.* 511.

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*March 19.**April 18.*

A testator who died in 1835, directed his executors and trustees (*A.* and *B.*) to convert his real and personal estate, and after paying his debts, &c. to invest the proceeds on mortgage of freeholds, &c. or on government securities. *A.* and *B.* deposited the proceeds in a Bank, at interest, in their joint names. *A.* died in 1842, and *B.* drew out the balance and applied it to his own use. No sufficient reason being shewn for retaining the money in the Bank, it was held, that the estate of *A.* was liable to make good the loss.

GIBBINS *v.* TAYLOR.

THE testator, *Thomas Gibbins*, devised and bequeathed to *George Taylor* and *Peter Sharland* their heirs, &c., all his real and personal estate, upon trust to sell, and out of the proceeds to pay his debts, &c., and to invest the residue *on mortgage of freeholds, copyholds, or leaseholds, or on government securities*, and to pay one-fifth of the interest, &c., to his wife for life, and the remainder to the Plaintiff.

The testator died in 1835. The trustees converted the personal estate and part of the realty. They did not, however, invest the produce, but placed it, as received, in their joint names in the *Devon* and *Cornwall* Bank, where the balance, from time to time, not required for payment of debts, &c. remained at interest.

*Sharland*, the principal acting trustee, died in *May*, 1842, at which time the balance at the bankers amounted to 462*l. 9s. 7d.* After his death, and in *December*, 1842, *Taylor*, the surviving trustee, drew the whole of the trust fund out of the bank and applied it to his own use.

In 1846, the Plaintiffs, who were then infants, instituted this suit for an account and a declaration that the estate of *Sharland* was liable, together with *Taylor*, to make good the sum drawn out of the bank by *Taylor*.

In

In *July*, 1846, *Taylor* was ordered to pay into Court the money drawn out of the bank, but he made default, and an attachment issued in *January*, 1854.

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In *June*, 1854, the common decree was made to take the accounts, and the cause now came on for further consideration.

Mr. *Lloyd* and Mr. *Karslake*, for the Plaintiffs, contended, that a clear breach of trust had been committed by both trustees, in allowing the money to remain in the bank, instead of investing it, as directed by the will. That *Sharland* was answerable for all the consequences, and that his representatives could not be heard to say, that if the money had been invested on government securities, according to the trust, *Taylor* could as easily have sold out the stock on the death of his co-trustee as have drawn the money out of the bank. That the estate of *Sharland* was therefore liable, with *Taylor*, to replace the fund. They cited *Clough v. Bond* (a); *Bacon v. Clark* (b).

Mr. *Follett* and Mr. *C. C. Barber*, contra, for the representatives of *Sharland*. In *June*, 1854, (eight years after the bill was filed,) the common decree was made, to take the accounts, and nothing was reserved as to the liability of *Sharland* in respect of the acts of his co-trustee. The present proceeding is not to compel the representatives of *Sharland* to make good a breach of trust committed by him, but to make one executor liable for the *devastavit* of another; it has been clearly settled, that one executor is not answerable for the defaults

(a) 3 *Myl. & Cr.* 490; 8 *Sin.* 594. (b) 3 *Myl. & Cr.* 294.

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Mr. *R. Palmer* and Mr. *Bovill* for other Defendants.

*The MASTER of the ROLLS.*

As the case stands, I think *Sharland's* estate bound, but I will allow his representatives an opportunity of shewing the propriety of keeping the money at the bank; and for that purpose the case may stand over.

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*April 8.*      *Sharland's* representatives having failed to shew any necessity for allowing the money to remain at the bankers, and asking no inquiries,

*The MASTER of the ROLLS* continued of the same opinion, that *Sharland's* estate was liable, and he directed his representatives to pay the amount with interest at four per cent.

(a) 11 *Ves.* 252.

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## SAMUEL v. WARD.

*May 6, 8.*

**O**N the 22nd of *May*, 1824, *William Ward* and his eldest son *David* conveyed an inn and other hereditaments in *St. Albans* to the Plaintiff upon trust to sell and discharge certain costs and debts, and to pay to the settlor 870*l.*, the amount of advances made by him to three of his children, and then to invest the residue and pay him the income for life, and after his decease, to pay to two of the three children (who had received advances) a sum sufficient, with the advances, to make up to each 400*l.*, and to pay to each of his other children (four in number) the sum of 400*l.*, and if any child should die in his lifetime the issue to take their parents' share. And he directed that the residue should be equally divided among the seven. And the Plaintiff was empowered, with the consent of the settlor, to advance to the children either the whole or any part of the 400*l.*

Soon after the date of the trust deed, the Plaintiff paid the debts, and the 870*l.* advanced by the settlor. At the request of the settlor, the Plaintiff made advances to some of the children out of the trust funds.

On the marriage of his daughter *Mary Toovey*, the settlor advanced her out of his own money a sum of 70*l.*, and on the marriage of *Elizabeth Sell*, another daughter,

*A. B.* settled property upon himself for life, with remainder to his children, with power, at his request, to advance any part thereof in his lifetime. Some advances were made to the children expressly under the power, besides which, on the marriage of two of his daughters, *A. B.* advanced to them certain sums out of his own moneys, but there was no evidence of an intention to purchase their shares. Held, that the latter advances were not to be treated as a satisfaction, *pro tanto*, of the daughters' shares under the settlement.

Satisfaction can only arise where the person who makes

the payment is himself the party bound to pay, or is the owner of the estate charged with the payment.

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he advanced her 200*l.*, and afterwards 100*l.* There was no evidence of his intention with these sums to purchase his daughters' shares *pro tanto*.

Mrs. *Sell* died in the settlor's lifetime, leaving children, but Mrs. *Toovey* survived him.

The question was as to the rights of Mrs. *Toovey* and the children of Mrs. *Sell*.

Mr. *Lloyd* and Mrs. *F. T. White*, for the Plaintiff, the trustee.

Mr. *W. D. Lewis*, for the executor of the settlor, contended that the estate of the settlor was entitled to be recouped the sums advanced out of his own moneys to his two daughters on their marriage. That the advances made to them were to be taken as purchases *pro tanto* of their respective shares, and that the settlor was entitled to stand in their place to the extent of these advances; *Trimmer v. Bayne* (a); *Lloyd v. Harvey* (b); *Pym v. Lockyer* (c); *Kirk v. Eddowes* (d); *Douglas v. Willes* (e); 2 *Sugd. Pow.* (f).

Mr. *Hallett*, for the children of Mrs. *Sell*, contended, that the advances made by the settlor did not constitute a purchase of his daughters' shares, but merely amounted to gifts. That a case of satisfaction could only arise when the party advancing the sum was also the party bound to pay the share or possessing the estate charged. That such was not the case here, and moreover, that there was no evidence of the settlor's intention to become a purchaser of the shares. H
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(a) 7 *Ves.* 508.
 " Russ. & M. 310.
 " 29.

(d) 3 *Hare*, 509.
 (e) 7 *Hare*, 318.
 (f) Page 226 (6th edit.)

cited *Plunkett v. Lewis* (*a*) ; *Douglas v. Willes* (*b*) ; *Farnham v. Phillips* (*c*) ; *Wood v. Briant* (*d*) ; *Chave v. Farrant* (*e*) ; *Folkes v. Western* (*f*) ; *Pitt v. Jackson* (*g*).

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Mr. Cracknell for Mrs. *Toovey*, in the same interest, cited *Lee v. Head* (*h*) ; *Noel v. Lord Walsingham* (*i*) ; 2 *Sugd. Pow.* (*k*).

*The Master of the Rolls* postponed judgment.

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*The Master of the Rolls.*

May 8.

The question in this case, as to which I have very little doubt, is, whether certain payments made by *William Ward*, the settlor, out of his own moneys, to two of his daughters, on their marriage, are to be treated as a satisfaction *pro tanto* of their shares under the settlement, or as putting the settlor in their place as a purchaser, to the extent of the advances of their interests under the deed—[*His Honor stated the settlement of 1824*].

On the marriage of her daughters Mrs. *Toovey* and Mrs. *Sell*, the settlor made advances to them out of his own money; and it is contended, on behalf of his executor, that these advances were intended as a payment, by way of anticipation, of what was coming to them under the settlement, and that the settlor or his executor is entitled to stand in their place to that extent. I do not think that this is established.

I

- (*a*) 3 *Hare*, 316.  
(*b*) 7 *Hare*, 318.  
(*c*) 2 *Atk.* 214.  
(*d*) 2 *Atk.* 521.  
(*e*) 18 *Ves.* 8.

- (*f*) 9 *Ves.* 456.  
(*g*) 2 *Bro. C. C.* 51.  
(*h*) 1 *K. & J.* 620.  
(*i*) 2 *Sim. & Stu.* 99.  
(*k*) Page 226 (6th edit.).

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I agree with Mr. *Hallett's* argument, that this is not a case of satisfaction, and that satisfaction can only arise where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment, in which case, the presumption against double portions leads to the inference that the party intended, by such payment, to discharge himself or his estate from the liability. Suppose the case of an uncle, settling certain sums on his nephews, it would be impossible to maintain, that their father, by advancing the amounts, without any understanding, would become entitled to stand in the place of his children under the settlement. He might, of course, contract to purchase their shares, but in the absence of evidence of such an agreement, it would be impossible to presume one, even if there were a correspondence between the sums. Here there is no evidence of any intention on the part of the settlor to become a purchaser of a part of his daughters' shares, and to which they were absolutely entitled, independent of their father. These sums constituted no debt from him, and were not charged on any property of his; and, consequently, the character of these advances must depend upon what took place at the time. The burden of proof, that it was a purchase, is on the settlor's executor, and no such proof has been offered.

I think, therefore, that the daughters or their children are entitled to retain the sums advanced, and also to receive the full amount of their shares under the settlement.

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HOPE *v.* HOPE.*May 27.*

THIS bill was filed by Mrs. *Hope*, by a next friend, against her husband, Mr. *Hope*.

Demurrer overruled, on the ground that the bill involved questions of too difficult a nature to decide on demurser.

An English gentleman married a French lady and became domiciled in France. Differences arose between them, and they entered into a contract, without the intervention of trustees, to put an end to them. It was in the French language, and was executed by one party in France and by the other in England, and was to be performed

It stated, that the Plaintiff was a native of *France*, and was married, in *England*, to the Defendant, who was a native of *England*, but subsequently to the marriage the Plaintiff and Defendant became *domiciled* in *France*, and resided, for some years, on the *Quai D'Orsay*, in the city of *Paris*, where their five children were born.

That disputes had arisen between them in 1853, and that the Plaintiff had commenced proceedings in the Consistory Court in *England* against the Defendant for a divorce.

That their two sons, being under the care of the Plaintiff, in *France*, a suit was instituted in this Court, in the name of the children, praying that the Plaintiff might be ordered to deliver up the two sons to their father, and upon motion in that suit, the Lord Chancellor

partly in *France* and partly in *England*. The wife filed a bill for specific performance against her husband, to which he demurred. The demurrer was overruled, on the ground that the application of the French law was not, upon the statements in the bill, excluded, and that the questions of international law were too difficult to be decided on demurser.

The Court will not decree the specific performance of a contract unless it can enforce the whole; but the difficulty seems to be removed where the part which it is impossible to enforce has already been performed.

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cellor had ordered, that the Plaintiff and Defendant should take all such steps as might be necessary and proper, according to the laws of *France*, for causing the two children to be delivered up to the said *Adrain John Hope*, from which order the Plaintiff had appealed to the House of Lords. The Court of First Instance in *Paris*, in *December*, 1854, directed the order of the Lord Chancellor to be carried into execution, and the Plaintiff appealed also from that order to the *Cour Impérial*.

Before the appeals had been heard, a compromise was agreed upon between the Plaintiff and Defendant, the terms of which were in writing, and were signed by the Plaintiff in *Paris* and the Defendant in *London*.

The agreement was in the French language, and was made between the Defendant of the one part, and the Plaintiff of the other, and the following is a translation of such agreement :—“ By a judgment delivered by the Civil Tribunal of the *Seine*, dated the 27th of *December*, 1854, it was declared, that there should be executed in *France* a judgment of the Lord Chancellor of *England*, which ordered that Mrs. *Hope* should be bound to deliver up to Mr. *Hope* the two sons, issue of their marriage, Messrs. *Adrian Elias* and *Jean Henry Hope*.

“ Mrs. *Hope* has appealed against this order, but, for the purpose of putting an end to these painful proceedings, the following terms have been entered into by the parties :—

“ 1. Mrs. *Hope* will immediately deliver up to Mr. *Hope*, Mr. *Adrian Elias Hope*; Mr. *Jean Henry Hope* will remain under the care of his mother.

“ 2. Mrs.

" 2. Mrs. *Hope* will abandon her suit for a divorce, instituted against Mr. *Hope* in the English Courts, and for that purpose, she binds herself to sign, without delay, all such deeds and documents as may be required.

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" 3. Mrs. *Hope* undertakes not to oppose the suit for a divorce, instituted against her by Mr. *Hope* in the English Courts, but, on the contrary, to facilitate the obtaining such divorce. It is well understood, that Mrs. *Hope* shall be able to see her children, to write to them and receive letters from them.

" 4. Mr. *Hope* agrees to pay in *France*, to Mrs. *Hope*, the annual sum of 75,000 francs,—in accordance with the decision of the Ecclesiastical Court, and to commence from the day it shall cease, to be paid,—payable quarterly and in advance.

" 5. Mr. *Hope* undertakes to pay, 1st, the expenses incurred in *England*, for Mrs. *Hope*; and 2ndly, Mrs. *Hope's* debts in *France*, but on condition that such debts shall not exceed the sum of 60,000 francs. These payments to be made by the hands of Mr. *Hope's* agent.

" 6. With regard to any accounts that may be unsettled between Mr. and Mrs. *Hope*, as well as the handing over to Mrs. *Hope* of any articles that may belong to her, the parties agree to leave the matter to be settled by Messrs. *Paillet* and *Duvergier*, whose decision shall be final.

"Executed in duplicate by the parties, for Mrs. Hope,
A A 2 at

The old man thought that the Japanese
+ Americans were good & he enjoyed their company.
So I would suggest to the children to spend time
with the old man & his wife.

To be good. Let the Imperial Army
Sharia shall be conquered. Let Punjab shall
distract us now. Let the Imperial Army
steal a new country. Let the Imperial Army
kill the country and area. Let the Imperial
Army and area under the Imperial

The H. Schlesier, Mr. Krasnow and Mr. Lopatin are
members of the Committee. This is an English organiza-
tion, so we understand by the English law; the ob-
jection that the Ukraine is not the Ukrainian Democ-
ratic Republic in Ukraine, and remains for some years in
Ukraine, where these two characters were born, does not
make it a Ukrainian constituent. It is stated to have been
executed

executed on the part of Mr. *Hope*, in *England*, and it would be extremely difficult, upon these averments, to sustain the proposition, that it is to be treated as a French agreement. But if it were really a French contract, the bill would be defective in not having stated its effect according to the law of *France*.

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[*The Master of the Rolls.* I think it would be difficult upon the facts alleged in the bill to say, that the effect of the French law upon this agreement between the husband and wife must necessarily be excluded. This bill alleges that they became domiciled in *France*; that the agreement was in the French language; that one part of the consideration for the agreement was the abandonment of the French suit, and a most material part of it was to be performed in *Paris*, and which, according to this bill, has been already performed, namely, the delivery up of the children.]

There is no allegation on the pleadings that this is a French contract, nor are the facts stated in the bill sufficient to make it a French contract. If anything special in the law of *France* be the foundation of the Plaintiff's equity, it ought to have been distinctly alleged; for if a party relies on foreign law to give validity to or to interpret any documents, he must allege that law as a fact, and prove it as any other fact. But here there is no allegation that this document ought to be construed according to the French law, nor is there any allegation as to what the French law is upon the subject. Some things were to be done in *Paris* and some in *England*. Mrs. *Hope* was to abandon her suit for a divorce in the English Courts, and was to facilitate the husband's suit for a divorce here; the Plaintiff also alleges that one, at least, of the parties executed the contract in *England*; these facts make it *prima facie* an English

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English contract. The *lex loci contractus* always governs the contract, unless that rule be varied by the circumstance that the contract is made in one place, but is to be performed in another; there the contract may be governed by the law of the place where it is to be performed. But that rule has never been applied, and cannot be applied to a contract which contains various terms, some of which are to be performed in one place and some in another; consequently, this contract must be construed as an English contract, and taking it as an English contract, it is bad on several distinct grounds.

This Court has never been asked specifically to perform any such a contract as that alleged by the present bill, which is one which cannot be enforced. In the first place, it is made between parties, who, being husband and wife, are incapable of contracting directly with each other. Secondly, there is a total absence of consideration on the part of the Plaintiff necessary to support an executory contract. Thirdly, parts of it are contrary to law and public policy, and cannot be enforced; and lastly, as there are parts which the Court will not decree to be specifically performed, and the agreement being such, that it cannot be enforced in its integrity, it cannot be specifically performed partially.

First, there is no valid contract. The law upon the subject of deeds and agreements for a separation between husband and wife is this:—the Court considers that these documents, if entered into between competent parties and for a sufficient consideration, and in such a manner as to constitute a binding contract, may be the subject of specific performance; they stand exactly on the same footing as any other voluntary deeds, executed and executory, and will receive precisely the same degree of assistance. But in every case in which this

this Court decrees the specific performance of an executory instrument, there must be a valid contract entered into between parties capable of contracting, and a good and valuable consideration for that contract. The contract here alleged is at variance with both these conditions; first of all, is there any contract between parties capable of contracting? There is none. It is a contract between husband and wife, without the intervention of any third party, who can be taken to have been the contracting medium for the performance of the agreement on the part of the *feme covert*. It is perfectly clear, that in *England* there must be the intervention of a third party, in order to produce a valid contract, inasmuch as between the husband and wife alone (unless the wife has a separate estate, which is made the basis of her contract), there is, on the part of the wife, an absolute incapacity to contract with any one, and therefore in all cases in which the Court has specifically performed agreements in the nature of separation deeds, there have been, besides the husband and wife, other persons, who, as trustees, contract on the part of the wife, and, on the other hand, take covenants from the husband for her benefit.

Secondly, there is a total absence of the necessary consideration for the contract. No stipulation on the part of the Plaintiff is binding on her. As to her agreement to abandon the legal proceedings instituted by her, she, no doubt, is capable of abandoning the suit for a divorce, but she is incapable of binding herself to do so, or not to sue again or not to obtain a divorce. It is, therefore, perfectly clear that no consideration can flow from a wife to a husband, by means of the promise to abandon suits instituted by her, inasmuch as she is not capable of contracting with her husband, and is not bound by any such promise.

Again,

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Again, this bill shews that the Lord Chancellor made an adverse order on Mr. and Mrs. *Hope* in the suit of their children, and which was necessarily made for the interests of the children alone. That litigation cannot by possibility be made a consideration for a compromise as between Mr. and Mrs. *Hope*, for both of them are equally bound to obey the order.

Thirdly, this Court never enforces an agreement which is contrary to the law, or is repugnant to public policy, and this agreement comes within that principle. By the first article the husband and wife, who are bound by the order of this Court, as to the custody of their sons, contract between themselves to disobey it, and to divide the two sons, so as to place them in a custody different to that which the Lord Chancellor has ordered. This article of the agreement is therefore diametrically contrary to the duty and obligation imposed on the parties by the existing order of the Lord Chancellor. Next, Mrs. *Hope* agrees to abandon her suit for a divorce, instituted against Mr. *Hope* in the English Courts, and for that purpose, she binds herself to sign, without delay, all such deeds and documents as may be required. By the third, Mrs. *Hope* undertakes not to oppose the suit for a divorce, instituted against her by Mr. *Hope*, in the English Courts, but, on the contrary, to facilitate the obtaining such divorce. Now, no one can doubt that the object of obtaining a divorce in the Ecclesiastical Court in such a case, is to be able to go to Parliament to obtain a divorce *a vinculo matrimonii*. The House of Lords, in such cases, requires to be satisfied that there is no collusion in the proceeding in the Ecclesiastical Court, and if these documents were before it, the divorce bill would be at once rejected. Any collusive agreement between husband and wife, for the purpose of obtaining a divorce,

is

is an agreement opposed to the policy of the law and is a fraud on the law, and even if a divorce were obtained by means of or in consequence of any such agreement, the proof of that collusion, in any other collateral proceeding, would absolutely invalidate the sentence of divorce itself. That was decided in the Duchess of *Kingston's Case* (*a*), and in *Harrison v. The Mayor, &c. of Southampton* (*b*), and other cases. If, therefore, this Court were to compel these parties to execute a deed containing such a stipulation, it would be directly opposed to the policy and spirit of the law. This is a collusive contract between the parties, to obtain from a Court of competent jurisdiction a judgment for which there is in fact no sufficient ground. Besides this, the bill alleges that the Ecclesiastical Court has dismissed the proceedings and so refused the divorce, and there being no allegation to the contrary, it must be taken as the admitted truth, that there was no ground for a divorce.

Fourthly, this being a suit for the specific performance of a contract, the question is, whether it be possible for the Court to decree specific performance of the whole of it, for if any part of the contract be opposed to the policy of the law, or of such a nature that it cannot be enforced, this Court will refuse to interfere by executing the agreement in part only. The present contract (as has been already shewn) contains provisions contrary to public policy, and besides it contains stipulations which this Court cannot enforce or order to be performed. How can it restrain or interfere with the proceedings in the Ecclesiastical Court. By the second and third articles of the contract, Mrs. *Hope* contracted to

(*a*) 20 *State Trials*, p. 355; 2 (*b*) 4 *De G., M. & G.* 137.
Smith's Lead. Cas. 424.

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to abandon her suit for a divorce; can the Court enforce that contract on the part of Mrs. *Hope*? In the third article, she undertakes not to oppose but to facilitate the divorce of Mr. *Hope*. How can the Court interpose and enforce that term of the contract as against Mr. *Hope*? Lord *St. Leonards* said, that he would not enforce a contract against one party, unless he saw his way to enforce it against the other. In *Gervais v. Edwards* (*a*), it was held, that this Court will not interfere to compel the specific performance of an agreement, unless it can itself execute the whole contract in the terms specifically agreed upon. The authority of *Wilson v. Wilson* (*b*) seems to have been since doubted in the House of Lords by two noble lords, who were not present at the delivery of that judgment. The Vice-Chancellor's decree extended to an injunction against the husband taking any proceedings in the Ecclesiastical Court for restitution of conjugal rights.

[The *Solicitor-General*. That was not so; having a most intimate knowledge of that case from having been in it, I can say, that the injunction was obtained on a very different ground from that. The husband was proceeding in the Ecclesiastical Court to compel his wife to prosecute her suit for nullity of marriage, which, if he could have been allowed to have done, he would have compelled her to annul the very agreement he had entered into, and which provided that no proceedings in the Ecclesiastical Courts should be taken, and therefore this Court said, "There being a suit here to enforce that agreement, you shall not be permitted to compel your wife to go on with a proceeding which will have the effect of destroying that agreement."]

With

(a) 2 *Dr. & War.* 80.(b) 1 *H. of L. Cas.* 538; 5  
*H. of L. Cas.* 40.

With respect to the claim of the Plaintiff of access to her children, that is provided for by the order in the other suit, which the Plaintiff may enforce.

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*Harrison v. The Mayor, &c. of Southampton (a); Fitzer v. Fitzer (b); Guth v. Guth (c); Lord St. John v. Lady St. John (d); The Earl of Westmeath v. The Countess of Westmeath (e); Worrall v. Jacob (f); Elworthy v. Bird (g); Wilson v. Wilson (h); Sanders v. Rodway (i); Hills v. Croll (k); Lumley v. Wagner (l); Gervais v. Edwards (m); 2 Roper, Husb. and Wife (n); Jodrell v. Jodrell (o),* were cited.

The *Solicitor-General* (Sir R. Bethell) and Mr. T. H. Terrell were not called on to support the bill.

*The Master of the Rolls.*

I am of opinion that I must overrule this demurrer. I do not mean to express any opinion upon the merits of the case; all I mean to observe upon are the facts stated in the bill.

The general state of the case, as it appears upon this bill, is this:—Mr. *Hope*, an English gentleman, married Mrs. *Hope*, a French lady. They resided in *Paris*, and had five children. Differences arose between them, in consequence of which proceedings were instituted, both with regard to the marriage and with respect to the custody

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| (a) 4 <i>De G., M. &amp; G.</i> 137. | <i>H. of L. Cas.</i> 40.             |
| (b) 2 <i>Atk.</i> 511.               | (i) 16 <i>Beav.</i> 207.             |
| (c) 3 <i>Bro. C. C.</i> 614.         | (k) 2 <i>Phill.</i> 60.              |
| (d) 11 <i>Ves.</i> 526.              | (l) 1 <i>De G., M. &amp; G.</i> 604. |
| (e) <i>Jac.</i> 126.                 | (m) 2 <i>Dru. &amp; War.</i> 80.     |
| (f) 3 <i>Mer.</i> 268.               | (n) Page 295 (2nd edit.).            |
| (g) 2 <i>Sim. &amp; Stu.</i> 372.    | (o) 14 <i>Beav.</i> 397.             |
| (h) 1 <i>H. of L. Cas.</i> 538; 5    |                                      |

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custody of the children. Respecting the custody of the children, the Lord Chancellor ordered them to be delivered up to the father. The children were at that time in *Paris*, in the care of the mother, and it was therefore impossible to enforce the order of the Lord Chancellor, except by means of the instrumentality of the French Court upon that subject. Steps were accordingly taken to get the French Court to enforce the order of the English Court, thereupon there being an appeal upon that subject, the husband and wife entered into a contract to settle all their differences. This contract, which is set out in the bill, was in the French language, it was executed by Mr. *Hope*, in *London*, and by Mrs. *Hope*, in *Paris*, in *March*, 1855, and if carried into effect, it would put an end to all disputes between them for the future.

The first thing I have to consider is this, whether, in that state of things, assuming the principle of this Court to be that on demurrer you must take everything most strongly against the pleader, the pleader must be held to have excluded all foreign law on the subject. I am of opinion that he has not, and that it is possible that he may be entitled to shew, at the hearing, that this contract is not executory in this sense, that it is to be followed by any deed hereafter to be executed ; and that it is by itself in the nature of a deed by specialty, as much as if it were under seal ; and that the foreign Courts would carry that into effect as it stands, treating it exactly in the same manner as we should treat it if it were an actual deed. Upon these pleadings, taking them as strongly as they can be taken against the Plaintiff, I see nothing to exclude the contention that there is a perfectly good consideration for this deed according to the French law. It is true, that, according to the English law, it may be necessary to have a trustee

trustee interposed to covenant for the purpose of indemnifying the husband against the wife's debts, but I see nothing to shew me that the Plaintiff may not be at liberty to satisfy the Court, that in *France*, upon a separation under a deed of this description, the indemnity to the husband would be complete; and that the creditors of the wife would not be able in *France* or in *England* to sue the husband for any debts contracted by her. If that be so, the interposition of a trustee would not be necessary. I do not mean to express any opinion upon this point, except to say, that this view of their rights under the contract does not appear to me to be excluded. Judging of it from the statements contained in this bill, it appears to me to be a question which might properly be argued at the hearing of this cause, and one too difficult to be decided upon demurrer, upon the present allegations, whether the contract is to be controlled by the French law or by the English law, having regard to the equal balance which there is of the matters being partly French and partly English, one part being French and the other part being English, and the contract being executed by one party in *Paris* and by the other party in *London*. This point I should not be disposed to decide upon demurrer, but think that it ought to receive grave consideration after the facts have been properly ascertained, and when it is decided by the law of which country this contract is to be governed.

But, assuming it to be entirely an English contract, I fully admit the doctrine which is stated, that the Court will not enforce a contract in part, unless it can enforce the whole, and I also admit that there is much of this contract which could not be enforced. For instance, it would have been impossible for this Court to have enforced the delivery up of the child to Mr. *Hope*, the child

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child being abroad. It is true, if it had been in this country, this Court might have been able to do so. Again, it could not enforce that part of it by which Mrs. *Hope* undertakes not to oppose the divorce suit adversely in the English Courts, and to do everything to facilitate such divorce. But agreeing to all those propositions, and particularly to the decision of *Hills v. Crolls* (*a*), and those other cases of which I think the case of Mr. *Price's* Reports (*b*) was the original instance, that this Court will not enforce one part of a contract where it finds itself unable to enforce the other part of it, the case is very different, where that part of the contract which this Court cannot enforce has been already performed by the party on whom that duty lay. In Mr. *Price's* case he had entered into a contract with a bookseller to compose and write the Reports of cases in the Court of Exchequer in consideration of a certain price to be paid by the bookseller. The Court would not enforce that contract against Mr. *Price*, saying "how can we do it, and by what means can we make him write a report of any case?" *Hills v. Crolls* was a similar case: there Mr. *Crolls*, being a chemist of some skill, had entered into an agreement with the Plaintiff as to the supply of certain chemical articles, and the Court said we cannot enforce the agreement, the Court has no such power. But, assume that Mr. *Price* had written and delivered his report, and done all that the contract required on his part, would the Court have allowed the bookseller to say that he would not perform his part of the contract, because Mr. *Price* could not have been compelled to perform his? Certainly not; the case stands upon very different grounds, and still more so when the things to be performed are

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(*a*) 2 *Phill.* 60.      (*b*) *Clarke v. Price*, 2 *Wilson, C. C.* 157.

of such character, that if completed it is impossible to restore the parties to the same situation they were in before. I will illustrate generally what I mean by putting this case:—Suppose a man enters into a contract to sell a house to another and to give him a good title, and that thereupon the purchaser enters into possession of the house before the completion of the contract, and that the vendor, having filed a bill for specific performance of the contract, the purchaser says, “I am perfectly willing to perform it, but you cannot make a good title.” If no good title can be made, does the Court allow the purchaser to keep possession of the house without payment of the purchase-money? At one time it was thought that the Court could give the vendor no relief; but I agree with Sir John Leach, who held, that if a good title cannot be made, the purchaser is not at liberty to keep the thing sold, but must deliver up and account for the property during his possession, if the vendor cannot make a good title.

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I refer to that for this purpose:—upon the allegations in this bill, assuming them to be true, on which of course I express no opinion whatever, Mr. *Hope* does not stand in a very favourable position, for he has gained every possible benefit he could under the contract, and yet he refuses to perform his part of it. This Court, therefore, would not look very favourably on his case if the facts were proved at the hearing to be such as are here stated. The case would be very analogous to that of a man who had taken possession of a house to which no good title could be made, who said, “I will pay you the purchase-money when you give me a good title,” which, as no good title could ever be made, would amount to this, “I have got the house, and intend to keep it without paying the purchase-money.”

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chase-money." Supposing a demurrer were put in to a bill stating a case of that description, and praying for specific performance, and it appeared upon the bill that the contract could not be executed by the Plaintiff, the Court might be compelled to allow the demurrer, but I apprehend that in such a case it would give the Plaintiff leave to amend, with a view of enabling the Plaintiff to raise the alternative, viz. that the Defendant was bound to replace the Plaintiff in the same situation as he was in before the contract, and either to restore the possession, or pay him an equivalent.

I merely throw out these considerations to shew the view I take of the facts here stated. I do not mean to express any opinion upon the case, except to say, that it is not shewn upon the allegations in this bill that the Plaintiff may not be entitled to some relief at the hearing of the cause, and that being so, I am of opinion that I ought not to allow the demurrer; and also if I went further, it appears to me that there is a graver and more important question to be determined in this case than I could properly determine upon demurrer, and which ought properly to be determined at the hearing of the cause.

Demurrer overruled.

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NOTE.—Upon appeal before the Lords Justices, the 16th of *July*, 1856, the Plaintiff desired leave to amend the bill, whereupon the demurrer was allowed, without prejudice to any question in the cause, and liberty was given to the Plaintiff to amend her bill. The bill was accordingly amended, and the Defendant again demurred. The demurrer was heard by the Lords Justices on the 16th of *February*, 1857.

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The OFFICIAL MANAGERS of the NEWCASTLE  
&c. BANKING COMPANY *v.* HYMERS.

*May 23.*

THE testator died in 1844, possessed of 100 shares in the above company. By his will, he gave a number of legacies, and the residue to *Mary Cowan*; and he appointed *Hymers* and *Carr* executors. The executors retained the shares and received six dividends on them. In 1847, they took some steps to sell them, but were dissuaded by the family from proceeding in the sale, on account of the loss of income which it would occasion. The bank got into difficulties, and in *January*, 1853, an order was made to wind it up. In *June*, 1853, a call was made, and the executors, in respect of the testator's shares, were ordered to pay 1,836*l.* out of his assets. The amount not having been paid, the Plaintiffs filed a creditors' suit for the administration of the real and personal estate of the testator, and a decree was made for taking the accounts.

Payments to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. Thus, where the testator held shares in a banking company, and nine years after his death the bank was wound up and a call made, it was held, that payments to legatees in the meantime could not be allowed to the executors as against the official manager in respect of the call.

Thirty-six items of payments made by the executors anterior to 1853, on account of legacies, annuities, interest and of residue, were disallowed by the Chief Clerk, as was also a sum of 520*l.* paid in *April*, 1853, to *Mary Cowan*, to compromise a suit instituted by her in respect of the residue.

Payments to legatees, made under a decree in a legatees' suit, cannot be allowed, as against creditors, if made without having the accounts taken, and therefore as upon an admission of assets.

*Carr* also stated, that in 1847, *Robert Cowan*, a legatee of 1,000*l.*, instituted a suit against the executors, and at the hearing in 1849 a decree was made to transfer to him a mortgage for 450*l.*, part of the assets, and to pay him 584*l.*, which was done. The executors sought

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to be allowed 1,000*l.*, the amount of *Robert Cowan's* legacy, thus paid under the decree of the Court; but it did not appear that any accounts had been directed, and it was therefore considered, by the Court, that the order must have been made as on an admission of assets.

Mr. R. Palmer and *Mr. Haig* for the Plaintiffs.

Mr. Roupell and *Mr. Cracknell* for the Defendant *Carr*, and *Mr. J. H. Palmer* for the Defendant *Hymers*. The question is, whether executors are entitled to be allowed in their accounts, as against the Plaintiff, the official manager, payments *bonâ fide* made by them to legatees, at a time when there was no debt due from the testator's estate, and before the present claim had any existence. We submit, that, on the result of the authorities, they are so entitled.

The question, whether executors are entitled to be allowed payments made to legatees, as against persons claiming a debt against their testator's estate, which was contingent when those payments were made, but became afterwards payable, is treated as unsettled by Mr. Justice *Williams* (*a*). The only decision on the question is against the liability of executors, and the other cases, when examined, will be found not to be authorities on the point.

In *Nector v. Gennet* (*b*), payment of a legacy was resisted by executors, on the ground that their testator had given a bond for a sum sufficient to exhaust the assets, and that they were, or might become, under a liability in respect of that bond. The contest in that case really was, whether the bond had or not been forfeited

(*a*) 2 *Wms. Exors.* 1150 (4th edit.). (*b*) 1 *Croke*, 466.

forfeited (the Court holding that it had not), for it was admitted by the Counsel for the executors and by the Court, that if the bond had not been forfeited, its existence was no answer to the claim of the legatees, Lord *Coke* saying, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day, for it is a duty *maintenant* which is in the condition. But otherwise it is, where a statute or obligation is for the performance of covenants or to do a collateral thing; there, until it be forfeited, it is not any plea against a legatee, for peradventure it never shall be forfeited, and may lie *in perpetuum*; and by such means no will should be performed." This principle was recognized and acted on by Lord *Kenyon*, in *The Chelsea Water-works Company v. Cowper* (*a*). The question was raised, but not decided, in the recent case of *Smith v. Day* (*b*), where one point was, whether executors, in an action against them by a specialty creditor of their testator, could give evidence of payments made to legatees, under a plea of *plene administravit*. The Court held, that they had in hand assets sufficient to answer the demand, and, therefore, that their plea was not proved in fact; but if the law had been as contended for by the Plaintiff, there could have been no occasion to consider that question. So, in *Simmons v. Bolland* (*c*), the question was considered by Sir *W. Grant* as doubtful.

The cases relied upon by the other side are *Hawkins v. Day* (*d*) and *Norman v. Baldry* (*e*). The first case, when examined, will be found to be no authority for the

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(*a*) 1 *Esp.* 277.
(*b*) 2 *Mec. & W.* 684.
(*c*) 3 *Mer.* 547.

(*d*) 1 *Amb.* 160; 2 *Amb.*
(App.), 803.
(*e*) 6 *Sim.* 621.

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the general principle, and that for two reasons :—the one, that the supposed payments of legacies were made too soon, Lord *Hardwicke* saying (*a*), “ It would be strange to say that legacies, paid immediately, where the executor has a year allowed him for that purpose, should be good against creditors ; ” the other, that it appears from the schedules to the Master’s report in that case (*b*), that the legacies disallowed were legacies to the executor and his wife, retained by him, and therefore still in his hands. *Norman v. Baldry* was a case of an actual obligation to pay a definite sum, and therefore falls within the distinction taken in *Nector v. Sharpe*, the defence of the executors being, not that the debts or liabilities were contingent, but that they had not any notice of the bond under which it arose, which, as is shewn by *Knatchbull v. Fearnhead* (*c*), affords no defence. So, *Davis v. Blackwell* (*d*), was decided on the ground that the Defendants, the executors, had paid legacies prematurely.

A similar question, in principle, has been sometimes raised with respect to payments of simple contract debts by executors, claims by specialty having afterwards become payable ; and it is settled, that as against such specialty creditors, these payments ought to be allowed ; *Henderson v. Gilchrist* (*e*), and they have been allowed in this case, though, in the regular administration of assets, the specialty creditor has priority.

2. But all the former cases were cases of liabilities of the testator, either actual or contingent, at the time of the payment of the legacies by the executors. Here, but for

(*a*) 2 *Amb.* 806.

(*b*) See 3 *Merv.* 558, in a note to *Simmons v. Bulland*.

(*c*) 3 *Myl. & Cr.* 122.

(*d*) 9 *Bing.* 5.

(*e*) 22 *Law J. (Ch.)* 970.

for the Winding-up Acts, the liability of this testator's estate would have ceased long since. The remedies of creditors against the shareholders of joint-stock banks are governed by the Banking Act, 7 Geo. 4, c. 46, and after three years from the death of a shareholder, his estate ceases to be liable in respect of his shares, both at law and in equity; *Barker v. Buttress* (*a*). If the Defendants, in the present case, are to be held liable, it is by means of an *ex post facto law*, his estate being made liable wholly by the Winding-up Acts. [The MASTER of the ROLLS. Your argument goes to shew that the Defendants ought not to have been put upon the list of contributories, but which you cannot now contest.]

3. As to *Robert Cowan's* legacy, that was paid under the decree of the Court, and the Defendants ought to be protected for obeying the order of the Court. That they did not put the testator's estate to the expense of taking the usual accounts, ought to make no difference, for, otherwise, no executors could safely pay a legacy without inflicting that expense upon the estate. *Thomas v. Montgomery* (*b*); *Musson v. May* (*c*); *Manning v. Phelps* (*d*), were also cited.

Mr. Bates, for the devisee of the real estate.

The MASTER of the ROLLS.

This case has been argued very elaborately, but ever since the cases of *Hawkins v. Day* (*e*), *Knatchbull v. Fearnhead* (*f*), *Simmons v. Bolland* (*g*), it has always been

(*a*) 7 *Beav.* 134.

(*e*) 1 *Amb.* 160.

(*b*) 3 *Russ.* 502.

(*f*) 3 *Myl. & Cr.* 122.

(*c*) 3 *Ves. & B.* 194.

(*g*) 3 *Mer.* 547.

(*d*) 10 *Exch.* 59.

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been held, that where there are debts, executors are not released from their liability by paying legatees. It is contended that the assets are not liable, but in order to maintain that, it ought to be established that the estate was not contributory. I must assume that the assets are liable, that the debt is established; and, in that case, the executors are not discharged, though they seek to discharge themselves by payment of legacies. It is a very hard case, but if the executors had got in and realized the outstanding estate by a sale of the shares, they would have incurred no liability.

I cannot treat the decree in *Cowan's* suit as anything. If the payments to the legatees had been made after taking an account of the debts and assets, in the ordinary mode under an administration decree, it would have been a complete indemnity to the executors; but this is not so; no such account was taken, and the payment to the legatees was made as on an admission of assets, and being so, it rather favours the case of the Plaintiffs.

As to the specific legacy, I must treat it as so much money in the hands of the executors, for I assume that they assented to it.

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*Note.—Carr* expressed his intention to appeal, but some compromise was come to between him and the Plaintiffs.

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## HIND v. SELBY.

*April 19.*

**T**HE testator, by his will, expressed himself as follows:—"I give all the *rest and residue* of my estate and effects, of what nature or kind soever, and wherever the same may be at the time of my decease, unto" three trustees (naming them), upon trust that they "do and shall dispose of so much thereof as may be necessary for the payment of my just debts, funeral and testamentary expenses, and after payment thereof, do and shall stand possessed and interested in my said *residuary estate and effects*, in trust to pay the rents, interest, dividends and annual produce thereof, unto my wife, during her life, in case she continues unmarried; and from and immediately after the decease or marriage of my said wife, then in trust to pay, assign and transfer all my residuary estate and effects unto and amongst my five children, *John, James, William, Mary and Phæbe, or the survivor or survivors of them*, at such age as my wife may, by her last will, or by any deed in writing, duly executed, direct or appoint, or in default of such direction, at their ages of twenty-one years, my said son *John* to have 150*l.* less than *James, Mary and Phæbe*, and *William* 60*l.* less, on account of advances already made for their use.

"Provided that in case any of the said children shall die before their respective shares shall become *payable*, leaving

at such ages as his wife should appoint, or in default at twenty-one. But in case of the death of any, before his share should become "payable," leaving issue, then to pay his share to such issue. A child attained twenty-one, and died in the life of the wife, leaving issue. No appointment having been made, held, that the survivorship had reference to the ceaser of the wife's estate, and that the issue, and not the representatives of the child, took the share.

A testator gave the "residue of his estate and effects" to trustees, upon trust to sell sufficient to pay his debts, and after payment, to hold "his said residuary estate and effects," in trust to pay "the rents," interest, dividends and annual produce to *A.* for life. There was a power to let and sell with the consent of *A.* Held, that *A.* was entitled to enjoy leaseholds *in specie*.

*Gift of residue in trust for testator's wife during widowhood, and on her death or marriage, to pay it amongst his five children, or the "survivor or survivors" of them,*

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leaving lawful issue, then my will is, that the share of the child or children so dying shall be paid or transferred to such issue respectively, in equal portions, when as they attain the ages of twenty-one years, and the interest, in the mean time, to be applied for or towards their maintenance.

“And my will is, and I hereby direct, that the said trustees shall be at liberty, with the consent and approbation of my said wife, *to demise or let*, and also to sell and dispose, as they shall think proper, of all or any part of my said residuary estate,” and invest such purchase-money in the public funds, or on government or real security, in their names, for the purposes aforesaid.

The testator died in 1827, possessed, among other things, of several leaseholds. He left his widow and four children surviving. One of these (*Phæbe*) attained twenty-one, and died in 1849, in the life of the tenant for life, leaving children.

The widow died in 1850, without having married again, and without having executed her power of appointment.

There were two questions: first, whether the widow was entitled to enjoy the leaseholds *in specie*; and secondly, whether *Phæbe's* representatives took any interest in the residuary estate.

Mr. *Lloyd* and Mr. *A. J. Lewis*, for the Plaintiffs, who were *James Hind*, a son of the testator, and the six children of *Phæbe*, on the first point, referred to *Goodenough v. Tremamondo* (a); *Pickering v. Pickering* (b); on the second point, *Billingsley v. Wills* (c).

Mr.

(a) 2 *Beav.* 512.      (b) 2 *Beav.* 31.      (c) 3 *dk.* 219.

**Mr. Giffard**, for the representatives of *Phæbe*. Each child acquired a vested interest on attaining twenty-one. The case differs from *Cripps v. Wolcott* (*a*), because in that case there was no power to appoint, and here the survivorship is only applicable in the event of the power not being exercised, and has reference to the death of a child under twenty-one. If the widow had appointed to a child absolutely, could it be contended that the gift would have been divested by that child's death in the life of the tenant for life. The word "payable" in the proviso must be referred to the preceding expression, "pay at their ages of twenty-one," and the issue of a child can only take in the event of the parent dying under twenty-one; *Earl of Salisbury v. Lambe* (*b*); *Jones v. Jones* (*c*).

**Mr. White, Mr. Kingston and Mr. Schomberg**, for other parties.

**The MASTER of the ROLLS** held, that the widow was entitled to the enjoyment of the leaseholds *in specie*.

He said that he had no doubt that the words "survivor or survivors" applied to the class to take, and referred to the death or marriage of the widow, and that the case came within *Cripps v. Wolcott*.

That the next question was, at what time these shares became vested and payable? And that, in the events which had happened, they appeared to be vested on the death of the widow, but payable at twenty-one, and that, consequently, the children of *Phæbe* were entitled to the share to which *Phæbe*, if she had been living at the death of the widow, would have been entitled (*d*).

(*a*) 4 *Madd.* 15; and see (*c*) 13 *Sim.* 561.  
*M'Donald v. Bryce*, 16 *Bew.* (*d*) *Reg. Lib.* 1855, A, folio  
 581. 971.

(*b*) 1 *Eden*, 465; 1 *Amb.* 383.

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*June 12.*

Where a suit is instituted merely for the protection of the assets pending a litigation for probate in the Ecclesiastical Court, the practice of the Court is, upon the grant of probate, to discharge the Receiver, stay all proceedings in the suit and dispose of the costs.

In such a suit, for which there was not a reasonable foundation, the Court ordered the Plaintiffs to pay all the costs, though a Receiver had been appointed.

BARTON *v.* ROCK. (No. 2.)

THE testator died in *March*, 1855, having made ~~a~~ ~~or~~ will, by which he appointed *Rock* his executor ~~to~~ ~~or~~, and disposed of his real and personal estate in favour ~~of~~ ~~or~~ ~~of~~ *Rock's* two children. The next of kin of the testator ~~or~~ were *Elisha Aubler*, the two Plaintiffs, and others.

Shortly after the testator's death, *Rock* propounded the will for proof in the Ecclesiastical Court, but a *caveat* was entered by *Elisha Aubler*. While these proceedings were pending, and on the 5th of November ~~1855~~, 1855, the Plaintiffs filed their bill for a Receiver *pendente lite*, but the bill did not allege any danger to the assets. A Receiver was accordingly granted on the 25th of November. The proceedings went on in the Ecclesiastical Court, but *Elisha Aubler* confined himself to the examination of the attesting witnesses to the will. On the 14th of December, 1855, sentence was given establishing the will; and on the 2nd of January ~~1856~~, 1856, probate was granted to *Rock* by the Ecclesiastical Court, and the costs of *Elisha Aubler* were ~~all~~ refused.

Afterwards, the Defendant *Rock* moved to discharge the Receiver, and to dismiss for want of prosecution, but the Court held, that it was not regular to dismiss, for want of prosecution, a bill merely for a Receiver *pendente lite*, but it gave leave to *Rock* to amend his notice of motion. This was accordingly done, and

Mr. T. H. Terrell now moved that the proceedings might

~~might be stayed, and that the Plaintiffs might pay the costs.~~

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*Mr. Moore, contra.* The Plaintiffs were not parties to the proceedings in the Ecclesiastical Court, and, therefore, they are not answerable for what took place there. The Plaintiffs would, in one event, have been interested in the assets, and were therefore entitled to have them protected pending the litigation ; and this Court, by granting a Receiver, has already decided, that the appointment of one was necessary under the circumstances.

The motion is irregular in asking that further proceedings may be stayed, for no further proceeding can possibly be taken in this suit. At all events, the Plaintiffs ought to have their costs of a suit instituted for the protection and benefit of the estate. He cited *Edwards v. Edwards(a)*; *Pinfold v. Pinfold(b)*.

*The MASTER of the ROLLS.*

These are not cases in which the Court can properly say, whether the suit has been successful or unsuccessful, for in all suits instituted merely to protect property, the Court, as a matter of course, protects it during the litigation. Still the bill may be properly or improperly filed for that purpose ; and this depends on whether there was a reasonable cause for instituting the suit at all. Until this Court has the means of determining the question, it will, as a matter of course, protect the property during the litigation, and, therefore, it cannot be said that the fact of granting a Receiver shews that the Plaintiff has been successful.

Next,

(a) 17 Jur. 821.

(b) 9 Hare, App. xiv.

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Next, it is said, that this Court cannot give costs in these suits. I am by no means clear, that the Court might not give the Plaintiff the costs of this suit, but it might give the Defendant the costs, and that would depend on whether it was or was not a reasonable thing to institute the suit. The fact as to whether the Plaintiffs were litigating parties in the Ecclesiastical Court does not appear to me to be material, further than this:—That it is proper that this Court should consider whether there was a reasonable ground for asking this Court for an order to prevent the Defendant here from receiving the property pending the litigation; whether in point of fact, having regard to the proceedings in the Ecclesiastical Court, the interposition of this Court was reasonable, and whether the Plaintiffs have reasonably taken advantage of what was going on in the Court of Probate. But, as to the jurisdiction of this Court, there is no question as all, for I am of opinion that it must deal with the question of costs, and ascertain whether the suit was properly instituted or not. I will read the affidavits, and dispose of this case on the first day of the sittings.

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June 19.      *The MASTER of the ROLLS.*

I am of opinion that this suit was not justified, and that there was not a sufficient amount of litigation in the Ecclesiastical Court to make it necessary. In point of fact, there was not, properly speaking, any litigation in the Ecclesiastical Court; there might have been, if an allegation and responsive plea had been brought in; but all that was required was, that the will should be proved in solemn form, for which purpose, a *caveat* was entered, and there was no evidence that the property was

was in danger. I think that the circumstances of this case were not such as to justify the Plaintiff in coming here for a Receiver *pendente lite*.

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It is true that the Plaintiffs were not the persons who were opposing the will in the Ecclesiastical Court, and the opponent of the will in the Ecclesiastical Court seems to have determined not to take any steps in this Court for that purpose: but the Judge in the Ecclesiastical Court thought the opposition to the will was so uncalled for, that he decreed the costs of the opposition to the will to be paid by the party opposing the proof of it, and not out of the estate.

In this state of circumstances, I am of opinion that this suit was not justified, and that the Defendant must have his costs of suit.

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NOTE.—The order directed all proceedings in the suit to be stayed, and that the Plaintiffs should pay the Defendant the costs of suit and of the application.

It was against this order that the Plaintiffs appealed, and which the Lords Justices affirmed with costs on the 17th of July, 1856. See *ante*, p. 83, n.

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*May 24, 28.*

Every deed is to be taken most strongly against the grantor; but where the owner of an estate, on his marriage, settles it upon himself for life, with remainders over, and is therefore, in one sense, both grantor and grantee, his interest under the deed is to be construed as if a stranger had been the grantor.

*A.*, on his marriage, settled his estate on himself for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not re-

*pairing the same."* Held, that he was entitled to cut all such timber (except ornamental) as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management.

VINCENT *v.* SPICER.

**O**N the marriage of Sir *Francis Vincent*, in 1824, he conveyed certain freehold estates, of which he was seised in fee, and surrendered certain copyholds to trustees, to the use of *himself for life*, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same, with limitations over in favour of the sons and daughters of the marriage in tail.

In 1826, Lady *Vincent* died, leaving the Plaintiff *Blanche Vincent*, the only child of the marriage, surviving.

In 1854, the Defendant *Spicer* purchased the life interest of Sir *Francis Vincent* in the settled estates.

The bill, which was filed by *Blanche Vincent*, stated that there was a large quantity of valuable timber on the estates, consisting of trees and plantations, which had been grown or left standing for the purpose of ornament and of young plantations, and trees unfit for cutting; that the Defendant *Spicer* had cut down large quantities of timber and other trees and underwood, and had recently marked more, with the intention of cutting it down, though some of it was unfit, to the irreparable damage

~~Damage of the estate.~~ It prayed an injunction and ~~an account.~~

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The Plaintiff applied for and obtained an interim order in chambers, in the vacation; the case coming on upon motion for an injunction, it was, by arrangement, turned into a motion for a decree.

**Mr. R. Palmer** and **Mr. Kay**, for the motion. The clause in the deed is to be taken most strongly against the grantor, and as the exception contained in it is entirely repugnant to the previous part, making the tenant for life unimpeachable of waste, the whole clause must be rejected, and the case must be regarded as if nothing had been said about waste, in which case the tenant for life would be unable to cut any timber at all. The effect of putting in those words, "except spoil or destruction, or voluntary or permissive waste," is to leave the privilege of the tenant for life in the same situation as if the clause had not been introduced at all, except that it gives him the right to windfalls. In *Garth v. Cotton* (*a*), the estate for life was without impeachment of waste, "except voluntary waste," and it was held that the tenant for life was precluded from cutting any timber. That is a very strong decision by Lord *Hardwicke*, but it is impossible to distinguish it from the present case. As to the rights of tenants for life, with or without impeachment of waste, they cited *Whitfield v. Bewit* (*b*); *Rolt v. Lord Somerville* (*c*); *Lewis Bowles's Case* (*d*); *Waldo v. Waldo* (*e*); *Wickham v. Wickham* (*f*); *Tregmiell v. Reeve* (*g*);

*Tooker*

(*a*) 3 *Atk.* 751; 1 *Ves. sen.*  
524, 546; 1 *White & Tud. Lead.*  
*Cas.* 451.

(*b*) 2 *P. Wms.* 240; *S. C.*,  
*Bewick v. Whitfield*, 3 *P. Wms.*  
267.

(*c*) 2 *Eq. Ca. Abr.* 759, pl. 8.  
(*d*) 11 *Rep.* 79 b.

(*e*) 7 *Sus.* 261.  
(*f*) 19 *Ves.* 419; *Coop* 288.

(*g*) *Cro. Car.* 437.

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*Tooker v. Annesley (a); Bullen v. Denning (b); Vincent v. Denning (c).*

*The MASTER of the ROLLS.*

Before hearing the Defendant, I will state my present opinion on the construction of this deed, without meaning to bind the Defendant by anything I may say.

When this case was first brought before me, my first impression upon the clause was, that it allowed the tenant for life to cut all timber which was not ornamental or unfit or improper to be cut. But Mr. Kay pressed me very strongly with the case of *Garth v. Cotton (d)*, as laying down, that wherever "voluntary waste" was excepted out of the provision, that the estate for life should be without impeachment of waste, those words nullified the clause altogether, and he contended that, having regard to the great authority of that decision, I must grant the injunction. I thought there was sufficient doubt arising upon that case to justify me in granting an interim injunction until the next seal, to keep things in *statu quo*. But having further considered the clause and attended to the argument I have heard upon it, I am now of opinion, that the clause does not altogether prevent the cutting of timber.

Many observations have been made as to the manner in which this clause is to be treated. It has been said, that it is to be taken most strongly against the grantor, and it will not be disputed by any one, that every deed is to be taken most strongly against the grantor; but when

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|-----------------------------------------|-----------------------------|
| (a) 5 Sim. 235, 240.                    | p. 481 (2nd edit.).         |
| (b) 5 Barn. & Cress. 842.               | (d) 3 Atk. 751; 1 Ves. sen. |
| (c) Tit. <i>Dilapidations</i> , Vol. 8, | 524, 546.                   |

when the owner of an estate in fee, upon his marriage, settles the estate on himself for life, with remainder to his children, he is, in one sense, the grantor, and, in the other, the grantee. But, in order to determine in which point of view he is to be regarded, in construing the deed, you must see, whether the exception is an exception out of the estate given to the grantee, or whether it is an exception out of the estate given by the grantor. He fills both characters, but you must consider in which character the exception is to operate against him, whether it is an exception out of the estate of the grantor or out of the estate of the grantee. In my opinion, I must treat this case exactly in the same way as if the estate had belonged to a stranger, which on the marriage of Sir *Francis Vincent* had been settled on him for life.

Then so regarding it, the question is, what is the proper construction to be put upon the clause? I concur with Mr. *Kay*, that if I can give no meaning at all to the clause, I must strike it altogether out of the settlement: and it follows, if this be done, that Sir *Francis Vincent* will simply have an estate for life, impeachable for waste, and then the Defendant, who represents him, will not be at liberty to cut any timber at all. I also concur in this very important rule of construction, that the Court will, if it can, give a distinct and sensible meaning to every word in the clause, and will give effect to it; but it would be a very strong thing to strike this clause altogether out of the settlement, upon the ground that the exception, as to waste, is exactly co-extensive with the clause making the tenant for life unimpeachable "of or for any manner of waste."

It is right that this Court, in construing this settle-  
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ment, should consider the situation of the parties at the time when they entered into a settlement of this description. Here is a gentleman, about to marry, who wishes to limit his paternal estate on himself for life, and, after giving certain benefits to his intended wife, to limit it on his children. He accordingly gives himself an estate for life, and he goes on to say, that it is to be "without impeachment of or for any manner of waste,"—a very strong expression. It is not merely without impeachment of waste, but it is to be "without impeachment of or for any manner of waste." Then there is to be an exception out of that for which he is to be unimpeachable; he is to be impeachable if he commit "spoil or destruction or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." The estate is then limited over. If I say that the meaning of this is, that although he is to be "without impeachment of or for any manner of waste," yet, by the exception afterwards introduced, he is to be impeached for every species of waste, I really destroy the whole effect of the clause altogether. It is clear that he cannot be impeached, and that no writ of waste would lie against him for or in consequence of destruction produced by wind or tempest :—that is quite clear. There might be a distinct covenant that he should repair such waste to buildings, where the waste is capable of being repaired, but where the waste is irreparable, such as where trees are blown down, it is obvious that he cannot be impeached for any waste in respect of that. Then I cannot hold, that these words "spoil or destruction or voluntary or permissive waste," are co-extensive with the preceding part of the clause. To what extent are they to be limited ? It appears to me, that the ordinary meaning which a person unacquainted with law and legal decisions would put upon it is the proper meaning, viz., that

that he is to be at liberty to do all those things, with respect to waste, which will not destroy or spoil, or lay waste the estate, in the ordinary and not in the legal sense; that is to say, he must not destroy any timber that is planted for ornament, or which is not fit or ripe to be cut, but must manage the estate in a reasonable and proper manner, and in such a way as would be expected from a person settling his estate on himself for life, with remainder to his children, in which case the power vested in the tenant for life would naturally belong to himself. It appears to me that this is the proper and reasonable construction to be put upon it.

I find no case which prevents me coming to such a conclusion, unless it be *Garth v. Cotton* (*a*), which, undoubtedly, is a very strong case. There the estate had been settled by an uncle on the nephew for life, without impeachment of waste, voluntary waste excepted; and, undoubtedly, Lord *Hardwicke* incidentally states, that timber could not have been cut; but what the nature and extent of this timber was, or whether any distinction was taken as to it, does not appear, except that, I think, it appears by the articles, that he agreed to cut only such timber as was proper to be cut. The question there was this:—A collusive agreement had been entered into between the tenant for life, and those entitled in remainder in case the tenant for life had no children, to cut the timber and divide the proceeds between them. Thereupon, when a tenant in remainder came into *esse*, having an estate prior to the remainderman who had entered into this collusive agreement, Lord *Hardwicke* held, that he was entitled to come against the tenant in remainder for his share of the proceeds;

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(*a*) 3 *Atk.* 751; 1 *Ves. sen.* 524, 546.

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ceeds ; but I do not find that he came against the tenant for life for his share of them. I do not think that Lord *Hardwicke* expresses any opinion on the liability of the tenant for life to repay to his own son the portion of the produce of the timber which he had received. Mr. *Kay*, no doubt, observed, that in such a case, it is reasonable enough to suppose, that the son would not ask any such relief against his own father, which is very probably the case ; but if the argument is to go to the full extent contended for in that case, it is clear that the money received from the father ought to have been repaid, just as much as the portion received by the tenant in remainder ; but the decree only goes to the latter extent. That case, therefore, differs very materially from the present, both in the words and in the circumstances under which the settlement was made. Here, taking into consideration the circumstances under which this settlement was made, and the other circumstances of the case, nothing was more improbable than that it should be the intention of these parties so to fetter the tenant for life, who was settling his own estate, that he was to have no power of cutting any timber at all, even if it was decaying, unless he came to this Court for permission.

I am of opinion that the proper construction of this clause is, that it is an exception out of a proviso made in favour of the grantee, which exception cuts down the power which is given to him to commit any manner of waste to this extent :—That he shall not spoil or destroy it. I think that the words “ voluntary or permissive waste ” are merely identical expressions, tantamount to those of “ spoil and destroy,” in which case, I should certainly give a very liberal and large construction to the meaning of the words “ spoil or destroy,” and should not allow (if there were any question about it) the

the tenant for life to do anything which would injure the inheritance for the persons who were to succeed in the estate; but I should treat it as an estate to be dealt with in the manner in which a gentleman not in distress, who had an ample estate which he wished to hand down to his children, would deal with it, namely, in a proper and husbandlike manner, not destroying any timber which was not fit to be cut. That is the view I take of this clause.

A great many questions may arise with respect to what is ornamental timber, and with respect to not cutting timber not fit to be cut. My view of the case would be, subject to what I may hear for the Defendant, that any timber which was not matured, and was improving, was not to be cut, unless for the improvement of the estate, by proper thinning, and the like.

That is the general view I take of this case, but I shall be very glad to hear the Defendant's Counsel upon the subject, if they consider the view I have expressed is not sufficiently favourable to them.

**Mr. Follett, and Mr. Southgate,** for the Defendant. The exception ought to be struck out, and the clause left unfettered. The Defendant does not claim a right to cut ornamental timber, within the meaning of the rule of this Court as to such timber, nor has he done so; and though he does not allege, that he has not cut down a handsome tree, yet he has cut nothing which can come within the principle of the rule as to ornamental timber, or the cutting of which can, in any way, operate to the injury of the estate. Besides, the Defendant does not claim a right to cut down timber planted, grown, or left standing for ornament, whether ornamental or not; but beyond this, he considers he has a full right  
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1856. to cut any timber he pleases. They cited *Smythe v. Smythe* (*a*) ; *Tooker v. Annesley* (*b*) ; *Chamberlyne v. Dummer* (*c*) ; *Burges v. Lamb* (*d*) ; *Coffin v. Coffin* (*e*) ; *Brydges v. Stephens* (*f*) ; *Peirs v. Peirs* (*g*) ; *Aubrey v. Fisher* (*h*) ; *Set. on Decr.* (*i*) ; 1 *Cru. Dig.* (*k*) ; *Vin. Abr.* (*l*).

The Master of the Rolls.

I am confirmed in the view I took on the former occasion of the construction of this deed; and I think I am introducing no dangerous precedent on this subject, because there must be similar words in the instrument before this can form a precedent for any subsequent case. If the words in this deed were "without impeachment for any manner of waste, except voluntary or permissive waste in the pulling down or suffering houses and buildings to go to decay," then, no doubt, the argument used on the part of the Defendant would be unanswerable, and he would be enabled to cut everything that a tenant for life, without impeachment of waste, is, according to the ordinary doctrine, entitled to cut, other than committing equitable waste.

I quite concur in the opinion, that the doctrine restraining the powers of the tenant for life, is not to be extended; but I am in this difficulty:—I must put some meaning on the words "save and except;" one side argues that I ought to give them the restrictive meaning, co-extensive with the words "without impeachment of waste," and then, that I must reject the whole

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| (<i>a</i>) 2 <i>Swanst.</i> 251; 1 <i>Wils.</i> C. C. 426. | (<i>g</i>) 1 <i>Ves.</i> 521. |
| (<i>b</i>) 5 <i>Sim.</i> 235. | (<i>h</i>) 10 <i>East</i> , 446. |
| (<i>c</i>) 3 <i>Bro. C. C.</i> 549. | (<i>i</i>) Page 466 (2nd edit.). |
| (<i>d</i>) 16 <i>Ves.</i> 174. | (<i>k</i>) Tit. 3, c. 2, <i>Estate for Life</i> , |
| (<i>e</i>) 6 <i>Madd.</i> 17; <i>Jacob</i> , 70. | p. 115 (4th edit.). |
| (<i>f</i>) 6 <i>Madd.</i> 279. | (<i>l</i>) Tit. <i>Dilapidation</i> , Vol. 8, p. 481 (2nd edit.). |

of that clause; and the Defendant's Counsel, in one branch of their argument, contend for the same construction, and argue, that I ought to reject the whole of the exception. If I were compelled to put the same extensive meaning upon the exception, I should adopt the Defendant's argument rather than the Plaintiff's. I should be disposed to think that the exception did not take away the original gift, and that the estate of the grantee was an estate "without impeachment of or for any manner of waste, except suffering buildings to fall into decay by not repairing the same." But I am of opinion, that I must put some construction upon the words in the exception "spoil or destruction, or voluntary or permissive waste."

The only distinct and clear meaning that I can give to it is, as it appears to me, that species of cutting of timber which the owner of an estate in fee simple, having not only a due regard to his own interest, but also a due regard to the permanent advantage of the estate, would cut, and no other. Of course he cannot cut ornamental timber, that is to say, timber planted or standing for ornament. Therefore, in the view I take of this case, I will make a declaration, that, according to the construction of the deed, the Defendant, as the assignee of the interest of Sir *Francis Vincent*, is entitled to cut such timber and other trees, not planted or standing for ornament, as an owner of the estate in fee simple, having due regard to his present interest, and to the permanent advantage of the estate, might properly cut in a due course of management.

The Defendant goes beyond this, and claims a right to cut timber exactly to the same extent as a tenant for life without impeachment of waste is entitled. As, in my opinion, he cannot go so far as that, I shall grant an injunction

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VINCENT  
v.  
SPICER.

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VINCENT
v.
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injunction to restrain him from cutting any timber or wood beyond that specified in the preceding declaration.

The Plaintiff is entitled to an inquiry whether the Defendant has already cut any timber beyond that which he is entitled to, according to my declaration, and to an account of the produce of it. There may be some difficulty in working this out, but I think it may be surmounted in Chambers.

I may explain the general view I take of the case by this illustration:—Suppose there was a very fine oak tree, of 100 years old, at a distance from the house, and not visible from the grounds, which was perfectly mature and fit to cut, though it might possibly still improve a little, I should hold that the tenant for life was entitled to cut that tree; but if the tree was forty or fifty years old, valuable to cut, but rapidly improving, and had not attained its maturity, I should hold that he was not entitled to cut it. It is a question of degree in each case, to be determined by ascertaining what a sensible owner in fee of an estate which he wished to preserve for his children would do. That is possibly not a very legal definition; but a man of common sense and understanding might easily put it in practice.

1856.

COARD v. HOLDERNESS.

June 21.

THE decision of the Master of the Rolls, on the general effect of the will of the testator in this cause, is reported, *ante* (a). In Chambers, on taking the accounts of the testator's real and personal estate, a question arose as to the effect of the codicil to the testator's will, dated the 12th *October*, 1853, which was in the following words:—

"Whereas my son *Henry Holderness* has had considerable sums of money from *Charles Walton Coard*, now I give and bequeath unto *Charles Walton Coard* the full amount of whatever sum or sums of money my son *Henry Holderness* may be indebted to the said *Charles Walton Coard* at my decease, with interest on the same; and it is my positive will, that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which he, my son *Henry Holderness*, becomes entitled to a life interest under my last will and testament."

At the testator's death, 923*l.* 15*s.* was due from *Henry Holderness* to *Charles Walton Coard*, and it being admitted that the share, to which *Henry Holderness* became entitled under the testator's will, was insufficient for the payment of the debt, *Coard* claimed to be paid or to retain the balance thereof out of the testator's general residuary personal estate, before division.

Mr.

The testator bequeathed to *C. W. C.* the full amount of whatever sum *H. H.* might be indebted to *C. W. C.* at the testator's decease. The testator added, "and it is my positive will, that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which *H. H.* becomes entitled to a life interest under my will." The share of *H. H.* proved insufficient to pay the debt.

Held, that this was not a demonstrative legacy to *C. W. C.*, and that his debt could only be satisfied out of the assets so far as the share of *H. H.* therein would extend.

1856.
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 COARD  
 v.  
 HOLDERNESS.

Mr. *Lloyd* and Mr. *Prendergast*, for the Plaintiff, *Charles Walton Coard*, contended, that although the legacy was directed to be paid out of the share of the son *Henry Holderness*, still it was not the less payable out of the testator's general personal estate, it being in the nature of a demonstrative legacy, and not of a specific character. That it was a direct gift, and that it was a matter of secondary consideration out of what fund it was to be satisfied, and did not fail by the insufficiency of the fund out of which it was primarily payable. They cited *Mann v. Copland* (a), *Fowler v. Willoughby* (b), and *Willox v. Rhodes* (c).

Mr. *Roundell Palmer* and Mr. *J. Sidney Smith*, for the residuary legatees, were not heard.

*The Master of the Rolls.*

I am of opinion that those cases are distinguishable from the present. There, several legacies having been given, the testator afterwards provided a fund which he directed to be the primary fund for their payment. I concur with those authorities, that the fund which the testator has made primarily applicable for that purpose shall be first applied in payment, and that the general legacies shall not fail by its insufficiency.

This case is distinguishable, the peculiarity of it is, that it is a bequest to the son's creditor, of what may be owing to him, and the testator then proceeds to say, that the amount required, whatever it may be, shall be paid out of the son's share under the will. This positive direction is so incorporated with the original bequest, that

(a) 2 *Madd.* 223.  
 (b) 2 *Sim. & Stu.* 354.

(c) 2 *Russ.* 452.

**that I feel it impossible to support it beyond the son's interest.**

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COARD

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**It is not so much a direct gift of the amount of the son's debt to his creditor, as a mode of providing for its payment out of what the son may take under the will. If the son had predeceased the testator, there would have been no benefit to the creditor, for the debt was only to be taken out of the share to which the son became entitled under the will.**

I think that nothing is given to the creditor but out of the share of the son, and that the debt, whatever may be its amount at the testator's death, is merely to be taken out of the share of the son, so far only as it will extend.

### STEWART v. STEWART.

March 11.

**T**HE principal object of the suit was to secure a legacy of 5,000*l.*, in which, subject to the life estate of the testator's widow, the Plaintiff was interested. But the widow having, by deed under a power contained in the will of the testator, appointed two new trustees, the bill originally insisted that the appointment was void, and that the widow was not of sufficient mental capacity to comprehend and understand the purport and nature of the deed, she being in a state of "*senile debility*." The Plaintiff

Where a charge against a Defendant is struck out by amendment, the Defendant is not justified in entering into evidence on the subject.

The original bill insisted on the invalidity of the appointment

of new trustees made by the Defendants, on the ground of her mental incapacity. Though the charge as to mental incapacity was struck out by amendment, the Defendant, nevertheless, entered into evidence on the subject. Held, that the course was improper, and though the appointment was upheld, and the Plaintiff was ordered to pay the costs relating to that matter, yet the Defendant was ordered to pay the costs of the evidence as to her mental capacity.

1856.

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STEWART
v.
STEWART.

Plaintiff amended the bill, by striking out the passages relating to the widow's mental incapacity. The widow and the new trustees, notwithstanding this, entered into evidence as to her mental capacity, and which the Plaintiff answered, as it reflected on him.

The principal question argued was as to the costs.

Mr. *R. Palmer* and Mr. *Rogers*, for the Plaintiff.

Mr. *G. L. Russell*, Mr. *Loudon*, and Mr. *Beavan*, for the Defendants.

The Master of the Rolls held, that the appointment was valid, and he directed the Plaintiff to pay the costs of the suit down to the amendment, so far as it had been increased by the charge of personal misconduct or incapacity of the widow, or the validity of the appointment of new trustees. But he held, that the Defendants were not justified in entering into evidence as to the charges which had been previously struck out, and he ordered the Defendants to pay the Plaintiff the costs of so much of their evidence as related to matters withdrawn from the bill by amendment.

His Honor added, that, in his opinion, the Plaintiff was justified in answering that part of the evidence, as it contained personal charges against him.

1856.

GREEN v. LOW. (No. 1.)*June 10.*

UPON a motion coming on for an injunction, the parties concurred in having it turned into a motion for a decree.

The **MASTER of the ROLLS** held, that the cause must be set down by order, in order to save the month's notice (a).

Mr. Lloyd, Mr. Smythe, and Mr. Southgate, appeared for the different parties.

(a) See 15 & 16 Vict. c 86, of August 7, 1852, *Ordines Can.* s. 15; and 22nd and 27th Orders 467, 468.

Where a motion for an injunction is, by arrangement, turned into a motion for a decree, it must be set down by order to save the month's delay.

GARDINER v. DOWNES.*June 10.*

THE Plaintiff, Mr. *Gardiner*, with Mr. *Baikie*, Mr. *C. Downes*, and Mr. *Wm. Downes*, were the trustees of a marriage settlement made in 1825. The property comprised therein consisted of money in the funds, some real estate, and a policy for 2,000*l.*, on the life of the husband, which he covenanted with the trustees to keep up. The settlement contained a power to the wife to appoint new trustees, in the place of any trustee who "should die or desire to be discharged from, or neglect or become incapable to act."

In

1856.
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 GARDINER  
 v.  
 DOWNES.

In 1852, *Baikie*, who was the active trustee, and wholly managed the trust, died, and, in 1855, *Gardiner*, who was sixty-seven years of age, and whose health was declining, became desirous of retiring from the trust. He requested the husband, who was tenant for life subject to an annuity, payable to his wife for her separate use, to procure the appointment of a new trustee, offering, at the same time, to pay half the expenses. The husband objected to the expense, and insisted that the proceeding was unnecessary. A long correspondence ensued, which produced no result.

The bill was filed in November, 1855, by *Gardiner*, praying that the trusts might be performed under the direction of the Court, and that, if necessary, new trustees might be appointed in the place of *Baikie* and the Plaintiff.

Mr. *Cairns* and Mr. *T. Hughes*, for the Plaintiff, asked for the relief prayed by the bill, and for the costs of the suit, rendered necessary, as they argued, from the conduct of the tenant for life.

Mr. *R. Palmer* and Mr. *Shapter*, for the Defendants, resisted the payment of the costs. They argued that a trustee was not justified in retiring from duties which he had engaged to perform, and that if he did so for his own convenience, or from mere caprice, it must be at his own expense; *Forshaw v. Higginson* (*a*); and see *Howard v. Rhodes* (*b*); and *Coventry v. Coventry* (*c*). That, in the present case, there was no reason for the Plaintiff's retiring, for there were no active duties to perform, the settlement containing no power for shifting the securities.

*The*

(*a*) 20 *Beav.* 485.      (*b*) 1 *Keen*, 581.      (*c*) 1 *Keen*, 758.

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v.  
DOWNES.

*The Master of the Rolls.*

This is a very unfortunate case, but the Court has no option, and must deal with it according to the settled rules. A trustee may file a bill to have the trust administered under the direction of the Court, to have the funds transferred into Court, and the dividends paid to the tenant for life, but the real object of this suit is, to have a trustee discharged. It is true, that this Court does not allow a trustee to retire from the trust from mere caprice, and that there must be some alteration of circumstances to justify him. But when I look at the circumstances of this case, I find that the Plaintiff became a trustee in the year 1825, and that after thirty years he files a bill to be discharged from his office of trustee. Mr. Baikie, his co-trustee, by whom what little duties there were had been performed, died in 1852; the Plaintiff might then have said, "I do not place any confidence in any person except Mr. Baikie, and on his ceasing to be a trustee, there has been such an alteration in the circumstances of the trust that I will no longer continue to act." It is said there were no duties to perform; but there was a covenant to insure, which, though it has been regularly and scrupulously performed, still it was the duty of the trustees, from year to year, to see that the premiums were paid, and if not, to take some steps for the purpose. Considering all these circumstances, and especially adverting to the fact, that the Plaintiff even offered to pay half the expenses, I must say that he was entitled to come to the Court to be discharged. I must appoint a new trustee, and the Plaintiff must have his costs of suit out of the trust funds.

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1856.



## WORMSLEY v. STURT.

*June 10.*

If a party be dissatisfied with the accounts brought in and vouched in the Judge's chambers, he may examine the accounting party *vivâ voce*, but he should give notice of the points as to which he is to be examined. The accounting party may, in such case, be required to produce the documents at his examination, notwithstanding an existing order for production elsewhere.

**T**HE Plaintiffs were legatees, and the Defendant the trustee and executor under the will.

The common accounts having been directed by the decree, the Defendant brought in and vouched his accounts. After this, the Plaintiffs served the Defendant with a summons, to attend at the Rolls Chambers on the 10th of June, 1856, to be examined as a witness on the part and behalf of the Plaintiff, and also with a *subpæna ad testificandum duces tecum*.

The Defendant now moved, that the Plaintiffs might shew upon what matters he was to be examined *vivâ voce*, and further, that if he was to be examined, he might be examined in the presence and with the assistance of Counsel, before the Judge personally, or before one of the Examiners of the Court, and further, that the writ of *subpæna* might be discharged wholly, or as to the production of documents thereby required.

Mr. R. Palmer and Mr. Rogers, in support of the motion. It is contrary to the practice to issue a *subpæna* for the examination of a party *vivâ voce*, after he has brought in and vouched his accounts, and they have been passed. It will occasion great and unnecessary expense and annoyance to the Defendant, and the Plaintiffs will travel into irrelevant matters not in issue. As to the production of documents, there already exists an order for their production at the office, and a *subpæna duces tecum* is inconsistent with that order.

Mr.

Mr. *Roupell, contrà*, was not heard.

1856.

 WOMERSLEYv.  
STURT.

The MASTER of the ROLLS.

Under the old practice, the accounting party brought in his accounts, and might afterwards be examined on interrogatories. My notion is, that by the present practice, when an accounting party brings in his accounts, and the other side is dissatisfied with them, the latter is at liberty to examine the accounting party *vivâ voce*, but I require him to give notice of the points as to which he is to be examined (a), in order that he may come prepared.

I think that the Defendant must be examined, and produce the documents, and the motion must therefore be refused with costs.

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(a) See the 30th *General Order* of 16th October, 1852, *Ordines Can. 492.*

1856.  

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*In re FARROW'S ESTATE.**June 25, 26.*

*A., in January, 1853, gave to B. his I. O. U. for 65*l.*. After A.'s death, B. having claimed the amount, his receipt for the amount was produced. B. swore, positively, that the amount had never been paid. The Court held, that it could not act on his unsupported testimony against the written evidence.*

**T**HREE were several accounts and transactions between *Farrow* and *Righton*.

On the 20th of *January*, 1853, *Farrow* gave *Righton* his I. O. U. for 65*l.*, and on the 12th of *February* following, *Righton* signed a receipt for the amount. In the course of the administration of the estate of *Farrow*, *Righton* insisted that though a receipt had been given for the amount, the money had never been paid. He stated this positively by his affidavit, and he claimed to set off the 65*l.* from the amount due to him to the estate of *Farrow*.

Mr. *Morris*, for *Righton*, argued, that the evidence being positive, that the money had never been paid, his claim ought to be allowed.

Mr. *Follett* and Mr. *Amphlett*, *contra*, argued, that the applicant could not be allowed to escape from the effect of his receipt, by his own unsupported testimony, especially after the decease of *Farrow*.

*The MASTER of the ROLLS reserved judgment.*

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*June 26.*

*The MASTER of the ROLLS.*

I cannot allow this claim. I am of opinion that I must trust to the statement on the written document, for I have

have nothing against it but the simple affidavit of *Righton*. I must act on general rules, and hold that his unsupported testimony cannot get over the written testimony. Three weeks after the date of the I. O. U., a receipt was given for the amount, and, to escape from the effect of it, *Righton* ought to have shewn by independent evidence that the money was not in fact paid.

In this state of the evidence, I cannot allow this sum.

1856.  
In re  
FARROW's  
Estate.

## SWALE v. SWALE.

July 1.

**I**N this case, two suits had been instituted in different Courts for the same purpose. The fact having been brought to the notice of this Court on an application for a Receiver,

*The Master of the Rolls* said, the proper course will be for the parties to apply to the Lord Chancellor to have the two causes transferred to the same Court.

If they do not, I shall myself apply to the Lord Chancellor for that purpose.

When two suits are instituted for the same object in different Courts, the parties ought themselves to apply to the Lord Chancellor to have them transferred to one Court. If they do not, the Court itself will apply to the Lord Chancellor for that purpose.

CASES IN CHANCERY.

1855.

Nov. 9, 12.

It is not, generally, the duty of a purchaser to inform a vendor of any of the circumstances which may make it desirable for him to purchase.

A first mortgagee with power of sale had entered into arrangements, but not a binding contract, for the advantageous sale of part of the mortgaged property.

After this, he bought up, at a reduced price, the interest of the second mortgagee, without informing him of the arrangements for sale. Held, that he was not bound to inform the second mortgagee of the opportunity he had of selling; and bill, to set aside the sale on the ground of suppression of information, was dismissed with

**JAMES W. NOKES** had purchased an estate at *Twickenham*, called "*Pope's Villa Estate*," on a speculation, intending to resell it in lots. He raised money by mortgaging it to Miss *Laslett*, and subsequently to the Defendants *Dolman* (a solicitor) and *Wyatt* for 4,000*l.*

In 1848, a considerable portion of the first mortgage had been paid off by sales of portions of the estate; but there still remained about 4,500*l.* due to the first mortgagee, and it was evident that the produce of the remainder of the estate was insufficient to pay both mortgages.

Though the first mortgagee had a power of sale, difficulties arose in selling the remainder without the concurrence of the second mortgagees. Nevertheless, in *September*, 1848, *Laslett*, being about to sell it for 5,000*l.*, the second mortgagees objected on the ground of the price offered being insufficient. A correspondence ensued between *Laslett* and *Dolman*, in which *Dolman* proposed to sell his second mortgage to *Laslett*. *Laslett* then proposed to give 500*l.* for it, which *Dolman* declined, but suggested 1,000*l.* as the price. *Laslett* afterwards proposed to give this sum as the consideration for a release of the mortgage for 4,000*l.* In answer to this *Dolman* wrote a letter, dated the 3rd *January*, 1848 stating, "I am authorized to say such proposal accepted."

A vs

A valid contract having been thus entered into between the parties, they proceeded to complete it; but, in the meantime, *Dolman* having heard that *Laslett* had entered into some contract with Lady *Waldegrave*, for the sale to her of a portion of the mortgaged property, wrote, on the 14th of *February*, to Lady *Waldegrave's* solicitor (Mr. *Pearson*): "I shall be obliged by your informing me if such a contract has been entered into, and what is the sum fixed for the purchase-money, and I have but little doubt that the sale may be completed with the concurrence of my clients, or that any interference of mine will be rendered unnecessary."

He did not appear to have obtained any information from Mr. *Pearson*, and on the 21st of *February*, 1849, *Dolman* wrote to *Laslett*, as follows:—

"I have delayed replying to your letter of the 6th inst., &c., &c. in consequence of my having received information that a contract had been entered into by you and Mr. *Nokes*, for sale of the property to Lady *Waldegrave*. I have now to request you will inform me of the nature of the arrangement, and the price to be paid by Lady *Waldegrave* to you, in order that I may not expose myself to an imputation of unfair dealing, on the part of the mortgagees subsequent to me, on the ground of inadequacy of consideration. This being done, I will at once afford every facility in my power for your arrangement."

To this, Mr. *Laslett* (the solicitor of the first mortgagee), on the 25th of *February*, 1849, replied, as follows:—

"I have not entered into any contract, nor has my sister; there is a difficulty in the way, unless she were solely

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DOLMAN
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solely seised. Mr. *Church* has been negotiating with Mr. *Pearson* (Lady *Waldegrave's* solicitor), but I declined entering into any contract unless you had sold. As you appear to hesitate about selling, I am willing to abandon the negotiation with you. Perhaps you will pay off my sister, and take the whole into your own hands; I will receive the amount at a day's notice. If you decline to pay her off, I think we had better have a peremptory sale, for the costs will be large if the thing is to remain. No interest has been paid on the mortgage; the interest must be paid, or the property at once sold. If I do not hear from you in a post or two, I shall consider the negotiation with you, as to the purchase of your mortgage, at an end."

*Dolman*, on the 27th *February*, 1849, wrote to *Laslett*, as follows :—

" *Understanding that no contract exists* for the sale of the property at *Twickenham*, in mortgage to Miss *Laslett*, I am enabled to advise the completion of the contract for sale to her of the interest of Mr. *Wyatt* and another in the property for the 1,000*l.*"

The purchase was accordingly completed by a deed of the 26th of *March*, 1849, by which *Dolman* and *Wyatt*, with the concurrence of *Nokes*, and in consideration of 1,000*l.*, transferred the mortgage of 4,000*l.* to *Laslett*. The deed recited that 4,638*l.* was due on the first mortgage, and that *Nokes* was satisfied, that the sum of 1,000*l.* was the full value of the property, subject to the first mortgage.

It is now necessary to refer to circumstances connected with this transaction, which took place in the interval and had been concealed from the Plaintiff, and furnished

furnished the grounds of this suit for setting aside the transaction.

1855.

DOLMAN  
v.  
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*Laslett* had, in fact, prior to *December*, 1845, entered into a verbal contract with the solicitor of Lady *Waldegrave*, for the sale of a portion of the property for 5,400*l.*, and he had stated, in a letter of the 23rd of *December*, 1848, to *Nokes*, "that he had agreed to let *Pearson* (the solicitor of Lady *Waldegrave*) have the lot he required for 5,400*l.*, and that this rendered it important that *Dolman* should be settled with. *Nokes* also, on the 27th of *December*, wrote to *Laslett*, stating that, "having agreed with Mr. *Pearson* for 5,400*l.*, it was most important that Mr. *Dolman* should be at once settled with, before he was acquainted with the amount sold." He added, "It will not do to let *Dolman* wait till *Pearson* pays his money, as he must be made acquainted with the amount, and of course he would not then consent."

It appeared also that *Nokes'* father, who acted for his son, wrote, on the 22nd of *February*, 1849, the following letter to *Laslett* :—

"I have had an interview with *Dolman*, and it appears he has heard something about the sale of the land at *Twickenham*, and he is endeavouring to find out the amount. *I of course threw dust in his eyes*, by saying I was sure no contract had been finally entered into, although I had heard some negotiation had been going on with Mr. *Church* (the solicitor of *Laslett*), making an offer which would hardly clear the mortgage debt due to you, with the interest, costs and expenses; and that I had some time since written to you stating that it was sacrificing the property, because, I said, the object of our persuading Mr. *Laslett* to give him a 1,000*l.* for

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for his interest was, that, at some future day, a better price might be obtained ; and that my son, most probably, would reap the benefit, if any ; whereas, in its present state, the interest was eating up the whole ; and instead of his receiving therefrom a 1,000*l.*, he would get nothing. *Dolman* said he should write to you to know the particulars ; and I think if you will inform him, firmly,—that you have not at present entered into any contract, that Mr. *James Nokes* disapproved of the terms, and that unless he at once completed the arrangement made, which you only offered to carry out, thinking that it might possibly, at some future day, be giving Mr. *Nokes* a chance of making a better price of the property, you would have nothing more to do with the matter, as you are heartily sick and tired of the continued delays and obstacles, that your course would be to file a bill for foreclosure. This would bring him upon his knees, because I know he is very anxious to get the 1,000*l.*. I have not yet handed the proposed contract to Mr. *Church*, and shall not, till I hear from you. Depend upon it, the best course will be to settle with *Dolman* before any contract be signed, or we shall be thwarted. As to the 5,400*l.*, if Lady *Waldegrave* should not complete, I engage, before *June*, to obtain a much larger sum for the lands she takes."

Laslett, after purchasing *Dolman's* interest, had, on the 20th of *April*, 1849, entered into a written contract to sell the principal part of the property to Lady *Waldegrave* for 5,400*l.*, and he afterwards sold the remainder for 900*l.*, thus realizing for the whole 6,300*l.*, while the first mortgage and interest, together with the amount paid to *Dolman*, amounted to no more than 5,638*l.*

Under these circumstances, the Plaintiff insisted that *Laslett* had been guilty of a fraud, by concealing and denying

denying the fact of the sale of a portion of the estate to *Lady Waldegrave* for 5,400*l.*, leaving a portion which afterwards realized 900*l.* So that *Laslett* had made a profit of 662*l.* by the transaction. The bill prayed in substance, that, notwithstanding the conveyance, *Laslett* might be declared a trustee of the surplus for *Dolman* and *Wyatt*.

Mr. Roupell and *Mr. Elderton* for the Plaintiff.

Mr. R. Palmer and *Mr. A. Smith* for the Defendant
Laslett.

The Master of the Rolls.

Nov. 12.

The object of this suit is to set aside a deed of the 26th day of *March*, 1849, by which the Plaintiff conveyed to *Laslett* his interest in the residue of certain premises at *Twickenham*, and the ground on which it is sought to be set aside is, that the deed was obtained by fraud and concealment. The fraud alleged consists in the concealment and suppression of the fact, that an agreement had been entered into by *Laslett* with *Lady Waldegrave* for the sale of a portion of these premises for 5,400*l.*; and the Plaintiff alleges, that if he had known this fact, it would have induced him not to sell his interest in the premises for 1,000*l.*

It is not generally the duty of a purchaser to inform a vendor of any of the circumstances he may be acquainted with, which may make it desirable for him to purchase any property or may make it available, still, however, if on the purchase there is an express statement of fact on either side, which causes the contract to be made, and on the faith of which alone the contract is made, and that fact is either false, or if there is a fact which it is well known will prevent the contract,
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*Noxes.*

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and which is suppressed for that purpose, it might render void the whole transaction (*a*); but this would depend on the circumstances and facts of the case.

I think it important to observe, that it appears obvious to me, that all the parties to this transaction were at this time equally well acquainted with the nature and value of the property. I feel quite satisfied that *Nokes*, *Dolman*, and *Laslett*, were all perfectly well acquainted with its value. Its value was of a speculative character, a good deal depending on the price to be obtained for accommodation and building land at *Twickenham*, and therefore the value could not be so well known as if it had been an agricultural estate in a distant part of the country, whose value would simply depend on the rack rent.

What, however, I have chiefly to consider is, whether *Laslett* was bound to communicate to *Dolman* that he had an opportunity of selling a portion of the property for 5,400*l.*? I am of opinion that it was not a circumstance which he was bound to communicate to *Dolman*. *Dolman* knew perfectly well what the nature of the property was; he offered to sell it for 1,000*l.*, and *Laslett* thought he could make it worth his while to buy it from him, and in that state of things, I think, it was not an incumbent duty on *Laslett* to inform *Dolman* of that fact. If I am right in that view of the case, the rest will follow, because upon that Mr. *Dolman*, by his letter of the 3rd of *January*, enters into the contract for selling the property, which, in my opinion, he could not afterwards have got rid of; and if *Laslett* was not bound to communicate the fact, that he had entered into a verbal agreement to sell a portion of this property for 5,400*l.* to Lady *Waldegrave*, it follows that this Court would have

(*a*) See *Pulsford v. Richards*, 17 *Beav.* 87.

have decreed the Plaintiff specifically to perform his contract, and that the suppression of that fact would not have prevented the contract being performed in this Court.

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The letter of the 14th of *February*, to Mr. *Pearson* from the Plaintiff, shews that he had distinct notice of some agreement between *Laslett* and Lady *Waldegrave*. It appears that Mr. *Pearson* declined to give him any information on the subject, at all events he did not get any. Thereupon the Plaintiff writes to Mr. *Laslett* on the 21st of *February*,—"I have delayed answering your letter of the 6th," &c. &c. (a).

In answer to that, *Laslett*, on the 25th of *February*, writes an answer, which is so far evasive, that being true to the letter it is not true in the spirit, because he says, "I have not entered into any contract," &c. (a). The only thing he does not there state is, that a verbal agreement has been entered into, not a legal or binding agreement, but, in point of fact, provided the arrangement with Mr. *Dolman* could be completed, there had been a verbal agreement entered into, which would be turned into a legal agreement. It was true he had not entered into any contract, but, however, he states the truth, when he says, "I declined entering into any contract unless you had sold," because it appears that all along he said, "he could not enter into any contract unless they arranged with *Dolman*." That part of it therefore is perfectly correct, and the only expression which I think can be found fault with is, that he used the word "negotiated," when he had done more than negotiate; but I do not think that that is sufficient to set aside this transaction, more especially as previous to this time there was a subsisting contract which could be specifically enforced. But when he

says

(a) See *ante*, p. 403.

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says "perhaps you will pay off my sister," &c. &c. "If I do not hear from you in a post or two, I shall consider the negotiation with you as to the purchase of your mortgage at an end;" he certainly was putting him at arms length. At all events, it was saying this:—"I do not intend to tell you anything about the negotiations; you may choose for yourself: you may choose to go on with the arrangement or not; if not, then I shall consider it at an end, and you may take your own course with respect to the matter; but if you like to go on, I will proceed." Thereupon, three days after that, *Dolman* says, "Understanding that no contract exists for the sale of the property at *Twickenham*, in mortgage to *Miss Laslett*, I am enabled to advise the completion of the contract." It is accordingly performed and completed within a month from that time. The transaction was then complete, and upon that state of affairs, I see no reason why *Dolman* could set it aside, though he says, "understanding no contract exists for the sale," although the proper expression was, that there was no legal contract existing—no contract to be legally enforced. Then he says, he was willing to go on to a completion of the contract which he himself had entered into.

Undoubtedly the whole matter is made much more suspicious, and a very unfavourable color is thrown upon it by a letter of *William Nokes*, the father, to *Laslett*, on the 22nd of February, which Mr. *Laslett* must have received before he wrote that letter to *Dolman*, in which he expressly asserts that he threw dust in the eyes of Mr. *Dolman*, and if Mr. *Dolman* knew of this he would not have had anything to do with it, recommending him to adopt a certain course with respect to him, and to keep him in complete ignorance of the whole matter, or else the transaction would not take

take place. I do not think the situation of Mr. *Noxes* is a very material one in this case; he is the father of the person entitled to the ultimate equity of redemption, and takes a very active part in this matter; he does not appear to me, on any one of the occasions, to be acting as the agent either of Mr. *Dolman* or of Mr. *Laslett*, he is a sort of go-between, through whom a great part of the information passes on both sides, but he is not the agent for either party. If he was the agent for either party, he was acting on behalf of his son, and endeavouring, naturally enough, to make the most he could of the property. He writes a letter to *Laslett*, which *Laslett* adopts, so far that he declines to give Mr. *Dolman* any information respecting the contract, and the course which Mr. *Noxes* himself adopted, or what he has stated, does not, in my opinion, make *Laslett* a participator in his views upon the subject.

Even if, upon the whole of that being established, I could avoid the contract which had already been entered into, still I am of opinion that this transaction cannot now be set aside, after the several events which have taken place. As I have already stated, I think that all depends on this fact:—whether, when the contract was entered into, *Laslett* was bound to inform *Dolman* of the existence of a verbal agreement to sell a portion of the property to Lady *Waldegrave* for 5,400*l.*? I am of opinion he was not, and that the contract between *Dolman* and *Laslett* could have been enforced, although that fact had not been communicated, there being, as I have stated, abundant reasons for shewing, why it was of great importance for *Laslett* to arrange with *Dolman* before he entered into any contract for a sale of the property. The result of my opinion is, that the bill must be dismissed with costs.

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SIMMONS *v.* HEAVISIDE.*Nov. 19.*

Application for leave to serve a notice of motion for an injunction, prior to the bill being filed, refused, the Court declining to do more than give leave to serve the notice of motion with the copy of the bill.

**M**MR. CRACKNALL asked for leave to give notice of motion for a special injunction for the 20th November, to restrain the sale of a ship, of which the Plaintiff had first obtained notice on the 18th of November. He said that the bill was not yet on the file, but that, by the old practice, a *subpœna* might, in an injunction case, be served before filing the bill, and that the Court had given the leave now asked in *Parker v. Great Northern Railway Company* (*a*).

He also observed, that as the *subpœna* was now abolished, the order asked was the proper substitute in urgent cases of injunction.

*The MASTER of the ROLLS.*

I cannot do more than give you leave to serve the notice of motion on the Defendant with the copy of the bill.

(*a*) 4 *De G. & Sm.* 138.

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See 4 *Ann. c. 16*, s. 22; *Hinde*, 76, and *Salmon v. Turner*, 4 *Beav.* 518.

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## BALDWIN v. BALDWIN. (No. 1.)

*July 4, 5.*

**B**Y his will, dated the 25th of *May*, 1854, the testator, *William Baldwin*, devised nine freehold houses in *Shropshire Row, Bilston*, to his sister *Apolonia Baldwin*, in fee.

He also bequeathed 4,000*l.* to his executors, payable out of such part of his personal estate as was, by law, capable of being bequeathed to charitable purposes, and declared that it should be held in trust that his trustees should, "by a proper deed and declaration of trust," with the concurrence of his sister, if living, settle it as follows:—"Upon such trusts as shall, to the said trustees or trustee, seem most expedient and best calculated to effect my desire and general object, that the annual income of the said sum of 4,000*l.* and the investments thereof should be, from time to time, applied to provide stipends or annuities, of such amount as such income shall, for the time being, be adequate to produce, for any number, not exceeding nine at any one time, of elderly persons of both sexes, and who shall, through misfortune, be in indigent or greatly reduced circumstances, and shall, in other respects, be worthy objects of charity. And I direct, that, in such deed or declaration of trust, shall be contained such trusts, provisions, rules, and regulations, concerning the said trust fund and the annual income thereof, and the application thereof, from time to time, and the management and mode houses" (there was none), and released his executors "from carrying out the same and the stipends and annuities connected therewith." Held, first, that the charitable gift was valid; and secondly, that it had been revoked by the codicil.

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mode of conducting *such institution*, from time to time, as shall, in the judgment of the said trustees or trustee for the time being, and with such concurrence of my said sister, if she shall be then living, be best adapted to carry into effect and preserve, in the most beneficial and efficient manner, the said general object and intention hereinbefore specified, and to define and ascertain the precise and best mode of carrying the same into practical operation, with such modifications only, from time to time, as the change of circumstances may render expedient, and expressly including such schemes, orders, rules and regulations, as shall be deemed advisable, for preventing or repressing, by forfeiture, suspension and other means, any abuse of the said institution and any misconduct in the parties enjoying the benefit thereof, and for regulating the age or respective ages and other conditions, at and upon which such persons shall be admitted thereto, and shall continue to enjoy the benefits thereof, and the mode of admission and of the investment of the capital of the trust fund, and the nomination, duties and rights of the trustees for the time being thereof, and the number of such trustees, and generally, for the regulation and adjustment of every question, matter and thing connected with the said *institution*."

The testator, in a subsequent part of his will, expressed himself as follows:—"And I beg to point out to my said sister, *but without intending to impose upon her any obligation, legal, equitable, or moral*, that the aforesaid messuages and hereditaments in *Shropshire Row, Bilston*, which are hereinbefore devised to her, might be converted into eligible almshouses for the recipients of the income of the said trust fund of 4,000*l.*, if, in her absolute discretion, she should think fit to extend or further endow the said intended institution."

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The testator made his brother, *Martin Baldwin*, residuary legatee and devisee.

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On the 13th of *June*, 1854, the testator made a codicil, which was as follows:—"I, *William Baldwin*, of The *Ellowes*, in the parish of *Sedgley*, do hereby make and confirm this as a codicil to my last will and testament, bearing date the 25th day of *May*, 1854, and which said will I hereby confirm in all respects save and except such part or parts thereof as relate to the building of certain almshouses, which said part I hereby revoke, and desire that my executors may be released from carrying out the same and the stipends and annuities connected therewith."

The testator died in *July*, 1854.

Mr. Bird, for the Plaintiffs, the trustees.

Mr. R. Palmer and **Mr. Druce**, for *Martin Baldwin*. First, the bequest of the legacy of 4,000*l.* for charitable purposes is void under the Statute of Mortmain, the real object of the testator plainly being to bring land into mortmain; *Trye v. The Corporation of Gloucester* (*a*); *Philpott v. St. George's Hospital* (*b*). The testator's intention is evident, he devises nine messuages to his sister, and points out to her his wish and desire that they shall be appropriated to his nine almspeople. Besides this, he applies to his charity the word "institution," which shews that the testator intended, though by indirect means, to found a charity of a permanent character attached to land; this is contrary to the policy of the law. Secondly, that the gift was wholly revoked by the codicil.

Mr.

(*a*) 14 *Beav.* 173.

(*b*) 21 *Beav.* 134.

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Mr. C. M. Roupell in the same interest.

Mr. Wickens, for the *Attorney-General*. The bequest of 4,000*l.* sterling, payable out of the pure personality, is a perfectly valid charitable gift. It is to operate quite independent of any land being brought into mortmain, and the stipends must be paid at all events, and though no residences be provided for the poor objects of the testator's bounty. The testator imposes no obligation whatever on his sister, and, as the bequest was to be carried into effect by the execution of a deed regulating the charity, both the trustees and the Court will take care that the deed of endowment contains no provision opposed to the policy of the law. The word "institution" does not imply that houses should be provided, and the discretion committed to the trustees was limited to the "stipends or annuities," and would not have authorized them to procure land. [*The MASTER of the ROLLS*. I concur in this,—that "institution" does not mean "building."] Secondly, the codicil did not revoke the bequest in the will. There is no revocation of the charitable gifts, but a revocation only of such parts of the will as related to building almshouses, and the will contained none; then there is a *release of the executors* from carrying out the stipends and annuities *connected therewith*, i. e., with building almshouses. It is clear that by the expressions used by the testator in the codicil he had not the will before him, or the terms of it in his mind. He refers to what he supposed he had directed by his will, viz., the building of certain almshouses, when he had done nothing of the sort. He must have referred to some prior will. The words of the codicil are, at all events, ambiguous; and a clear bequest in a will can only be revoked by words equally

equally strong in the codicil; *Doe d. Hearle v. Hicks* (*a*); *Cleobury v. Beckett* (*b*); *Jarman on Wills* (*c*).

The Master of the Rolls.

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Notwithstanding the able argument, I think that the bequest is revoked by the codicil. The reason why I come to that conclusion is this:—I think upon the will alone it would have been extremely difficult to hold, that the bequest was void under the Statute of Mortmain. It is evident that the will was drawn by a skilful draftsman, for the express purpose of evading that statute, and I think that throughout it is pregnant with that object; but I also think that it has been effectually done, and that the testator has accomplished his object. Though there is a suggestion to the sister to devote some houses to the almspeople, yet there is nothing in the will which necessarily requires land being brought into mortmain.

The case upon the will is this:—The testator directs a sum of 4,000*l.* to be applied by trustees in the payment of stipends or annuities to poor old men and women, and he gives certain directions for the execution of a deed to regulate the application of the income and the admission of the objects of the charity. It is pretty obvious that the trustees, in carrying that into effect, would think it extremely desirable to provide for the poor men and women in some existing almshouses, or in some place of that description, unless some person could be found willing to devote land to that purpose. I do not make these observations for the purpose of shewing that this gift is void, because I have already expressed

(*a*) 8 *Bing.* 475.  
(*b*) 14 *Beav.* 583.

(*c*) Vol. I. p. 146 (2nd edit.).

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expressed my opinion that the obstacle of the statute is evaded, but for the purpose of explaining what I think is the meaning of the codicil. It is to be observed, that although the will was obviously drawn by a skilful professional draftsman, yet the codicil, which is dated nine days after the will, and refers expressly to it by its very date, was not drawn by a professional draftsman, but probably by the testator himself. He refers to some part of the will which, having been executed so short a time before must have been present to his mind, and he expressly revokes those parts of the will "which relate to the building of certain almshouses," and he "desires that his executors shall be released from carrying out the same, and the stipends or annuities connected therewith." The testator uses the exact words, "stipends or annuities," which are used in the will; but he refers to stipends or annuities connected with almshouses. The word "almshouses" is not mentioned in this part of the will, but the elderly persons, who were to receive "stipends or annuities," are almspeople to all intents and purposes, according to the ordinary acceptation of that term. Having directed that the stipends or annuities connected with the almshouses shall be revoked, it is impossible, in my opinion, to put any other construction on the codicil than to say, that the testator intended to revoke that particular gift in the will.

It is a very just rule which is laid down in *Doe d. Hearle v. Hicks* (a), that an express gift is not to be revoked except by distinct and clear words; there is, however, another rule of construction, which is equally proper, that you must not strike words out of a testator's will,

(a) 8 *Bing.* 475.

will, but must give them their meaning and operation if you can.

Now, the revocation here is not ambiguous. It is quite clear that he revoked some "stipends or annuities" given by his will, and the only "stipends or annuities" are given to old people. The codicil revokes the stipends or annuities in his will connected with alms-houses, and in the will there are stipends or annuities given to almspeople. I am of opinion, that this is sufficiently clear and distinct to constitute a revocation of that gift in the will, and I am accordingly of opinion that the codicil revokes it.

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BALDWIN v. BALDWIN. (No. 2.)

*July 4, 5, 24.*

THE testator, out of his pure personality, bequeathed a legacy of 8,000*l.* to his trustees upon the following trusts:—"Upon trust, in case at my decease or at any time within twenty-one years next after my decease, the general object hereinafter expressed can be legally carried into effect, either by means or pursuant to the provisions of any Act or Acts of Parliament already passed or to be passed, or by any other legal means, then, as soon as conveniently can be after my decease or the subsequent legalization of such object, the said sum of 8,000*l.*, and the investments thereof, and the annual income to accrue thereon after my decease, or,

A testator gave 8,000*l.* to his trustees, upon trust, in case at his death or within twenty-one years thereafter, his object could be legally carried into effect, by an act passed or to be passed, to apply it for providing a site for erecting a church at *B.*, in the parish of *W.*, with proper schools attached, and for

the endowment of the church. Though a separate district had not yet been created under the 6 & 7 Vict. c. 37, it was held, that the bequest was not void under the Mortmain Act, and that the Ecclesiastical Commissioners would become entitled to the legacy, if, within the stated period, such a district should be constituted under the provisions of the statute.

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as the case may be, after such subsequent legalization, (and which sum and investments are hereinafter referred to as the said *church fund*,) shall be applied for or towards the effecting the general object hereinafter specified, namely, the *providing a proper site for erecting and the erection and completion of a church* for the worship of God according to the rites of the established Church of *England* and *Ireland* in that part of the township of *Bilston* aforesaid called *Bradley*, in the parish of *Wolverhampton* in the said county of *Stafford*, with proper schools attached thereto, and for or towards the endowment of such church or the benefice thereof. And for giving effect to such object, so far as the same may be practicable, I direct that the said trustees or trustee for the time being hereunder shall by deed, &c., declare and make such trusts, provisions, rules, and regulations concerning the said *church fund*, and the annual income thereof and the application thereof respectively, as shall, in their or his judgment, be best adapted to carry into effect, in the most beneficial and efficient manner, the general object hereinbefore specified, or such portion or portions thereof as may, for the time being, be legally practicable, and to define and ascertain the precise and best mode of carrying the same into practical operation, and the respective proportions of the fund to be appropriated to any or either of the aforesaid particular objects, and the mode of investment, and of the variation of the investments of the said sum of 8,000*l.*, and the original nomination and new appointment, from time to time, of trustees thereof, and for the regulation and adjustment of every question, matter and thing connected with the same fund and the application thereof, and for any such modifications of the said general object, as may, under the circumstances of the case, appear expedient. Provided nevertheless, and I hereby recommend, but so as not to impose any condition

dition or obligation whatsoever, that the proportions in which the said *church fund* should be applied for the principal objects hereinbefore specified should be, three equal fifth parts thereof for the site, erection and completion of the said church and schools, and two equal fifth parts thereof for such endowment, and that if and so far as the same may be or become legal, such endowment fund or the greater part thereof should be invested in the purchase of land."

" Provided always and I direct, that in the aforesaid declaration of trust of the said *church fund*, provision shall be made, to the effect, that if, within the aforesaid limited period after my decease, and under or pursuant to the provisions of the Act of the sixth and seventh years of the present reign, chapter 37, or other legal authority, that part of the said township of *Bilston*, called *Bradley*, or any portion thereof, should be duly constituted a separate district for spiritual purposes, it shall be lawful for the said trustees for the time being of the said church fund to transfer unto or vest in the ecclesiastical commissioners for *England*, or any other commissioners, corporation, or public body who may be legally authorized in that behalf, the same *church fund*, or such portion thereof as to the trustees thereof shall, under the circumstances of the case, appear sufficient or proper, for or towards the providing a church or chapel for such district, and for or towards the endowment or augmentation of the income of the minister or perpetual curate thereof, or for either of such purposes, and if for both, then in such proportions as the same trustees shall think most beneficial." He then authorized the trustees of his will to pay the *church fund* to the trustees appointed by the deed of trust, and further directed the intermediate annual income of the *church fund*, from the time of his decease until the same fund should become

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become legally applicable for effecting the aforesaid objects or any of them, or until the sooner expiration of the aforesaid term of twenty-one years, and the capital if it should not become so legally applicable within the said term, should sink into and form part of his residuary personal estate.

The testator died in *July*, 1854.

The 6 & 7 Vict. c. 37, intituled "An Act to make better Provision for the Spiritual Care of populous Parishes," by the 9th section, after reciting that "there are divers parishes, chapelries and districts of great extent, and containing a large population, wherein or in parts whereof the provision for public worship and for pastoral superintendence is insufficient for the spiritual wants of the inhabitants thereof," authority is given to the Ecclesiastical Commissioners, with the consent of the bishop, to constitute a separate district, but the draft of their scheme is to be laid before her Majesty in council. It proceeds—" provided also, that in every scheme for constituting any such district, the said commissioners shall recommend to her Majesty in council, that the minister of such district, when duly licensed, as hereinafter mentioned, shall be permanently endowed, under the provisions hereinafter contained, to an amount of not less than the annual value of 100*l.*; and also, if such endowment be of less than the annual value of 150*l.*, that the same shall be increased, under the like provisions, to such last-mentioned amount, at the least, so soon as such district shall have become a new parish, as hereinafter provided."

The 22nd section is as follows:—" And for the encouragement of such persons as shall be disposed to contribute towards the purposes of this act, and that their

their charity may be rightly applied, be it enacted, that all persons having any estate, &c., in any lands, &c., may, by deed inrolled, or by testament, "give and grant to, and vest in the said Ecclesiastical Commissioners for *England* and their successors, all such his or their estate, interest, or property in such lands, &c. &c., for and towards the endowment or augmentation of the income of such ministers or perpetual curates as aforesaid, or for or towards providing any church or chapel, for the purposes and subject to the provisions of this act, &c. &c.; and such commissioners and their successors shall have full capacity and ability to purchase, receive, take, hold, and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or aliene to the said commissioners any lands, tithes, tenements, or other hereditaments, goods, or chattels, without any licence or writ of *ad quod damnum*, the Statute of Mortmain, or any other statute or law, to the contrary notwithstanding."

*Mr. Bird*, for the trustees.

*Mr. Druce* (in the absence of *Mr. R. Palmer*), for the residuary legatee. Independently of the statute of the 6 & 7 Vict. c. 37, the bequest is void under the Mortmain Act, for its express object is to procure land as a site for the church and school, and to erect a church and school-room thereon. The objection is not removed by the discretion given to the trustees, for its tendency is to bring land into mortmain, which is contrary to the policy of the law and void; *Trye v. The Corporation of Gloucester* (*a*); *Philpott v. St. George's Hospital* (*b*); and a gift or limitation having a tendency opposed to the

(*a*) 14 *Beav.* 173.

(*b*) 21 *Beav.* 134.

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the policy of the law is invalid; *Egerton v. Lord Brownlow* (a).

At the death of the testator, the gift was void under the existing law, and it could only take effect in the event of its becoming legalized by subsequent legislation. No district had then been created, and the validity of the gift must be determined at the death, for subsequent alterations in the law could not revive an invalid bequest. The act only authorizes a gift to the commissioners; here the bequest, which is to the trustees, does not come within the terms of the Act. It is made contingent on an alteration being made in the law, and in effect is an undue inducement to the legalization of a charitable bequest which was invalid at the testator's death.

Mr. C. M. Roupell, for *Apolonia Baldwin*, in the same interest.

Mr. Lloyd and Mr. Fleming, for the Ecclesiastical Commissioners. The testator had two modes of effectuating his object; first, by means of the trustees; and, secondly, under the provisions of the late statute. The alternative scheme, which the trustees, by the word "or," have the power of authorizing, renders the gift valid; for where an option is given to trustees to effect a charitable object in either of two ways, one of which is legal, and the other illegal, the Court would compel the adoption of the legal mode, so as to render the gift valid. Under the 6 & 7 Vict. c. 37, the legislature contemplated a previous gift enabling the commissioners to effect a division of a parish, for, without an endowment and provision for the clergy, no division of

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(a) 4 H. of L. Cas. 140.

a parish could ever be made. This enabling act, by which the legislature authorizes an object to be carried into effect by commissioners, ought to be construed liberally. The 22nd section is express upon the subject. It empowered any person, by will, to give and grant to, and vest in, the Ecclesiastical Commissioners, lands for the purposes of the statute. [*The MASTER of the ROLLS.* If the district had been constituted before the death of the testator, there could be no doubt; but could the endowment by will be made by anticipation? Again, could a testator direct the accumulation of a fund, and then make a valid gift of it, to take effect only in case the law should be altered, for instance, in the event of a marriage with a deceased wife's sister being made valid.] A testator might suspend the final disposition of a fund during the period allowed by law, which the testator has done in the present case, and then direct it to be applied to any object legal at that period. All the provisions of the statute are prospective.

It is not necessary that the gift should be direct to the commissioners, it may be made to them through trustees. [*The MASTER of the ROLLS.* I do not think that the interposition of trustees makes any difference.] The amount of the legacy must be set apart to await the constitution of the district by the Ecclesiastical Commissioners, and, when constituted, the commissioners will have a right to demand the transfer of the fund to them.

They cited *Attorney-General v. The Bishop of Chester* (a); *The Mayor of Lyons v. The East India Company* (b); *The Church Building Society v. Barlow* (c);  
Incorporated

(a) 1 *Bra. C. C.* 444. (c) 3 *De G., M. & G.* 120.  
(b) 1 *Moo. P. C. C.* 175, 298.

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Incorporated Church Building Society *v. Coles* (*a*) ;  
*White v. Vernon* (*b*) ; *Girdlestone v. Creed* (*c*).

*Mr. Druce* in reply.

July 24.

*The MASTER of the ROLLS.*

The question here is whether the bequest made by the testator is valid.

It is first contended that this legacy tends to introduce land into mortmain, and that, according to my decision in *Trye v. The Corporation of Gloucester* (*d*), this is void. On the other side, it is not disputed, upon the legacy itself, as it stands, that it comes within the principle of that decision, and that part of the case is not in fact urged on behalf of the charity. But then it is contended, that it is rendered valid by the 6 & 7 Vict. c. 37, intituled, "An Act to make better Provision for the Spiritual Care of populous Parishes."

I think it unnecessary to consider the question as to whether the Court will allow a fund to be applied for a purpose which is not legal at the time, but which is afterwards made legal by an Act of Parliament, because I think the present question turns upon the construction of this statute. If this district of *Bradley* were an existing district, created by the Commissioners under the statute, for the purpose of making provision for the spiritual care of souls, no question would, in my opinion, arise upon this point. The only question arises from the fact that the district was not, either at the date of the will or at the death of the testator,

or

• 145.

(c) 10 *Hare*, 480.— *Druce*14 *Brown* 172

or even at the present moment, an existing district, and it is urged that the 22nd clause of this statute does not authorize the giving of land in mortmain for the purpose of creating a new district.

I assume that, independently of the Act, it is impossible that this could be done, and the only question is, whether the Act authorizes it. On reading it over and considering the matter as carefully as I can, I am of opinion that the statute does authorize it, and that the bequest is perfectly good. Before reading the 22nd section, I think it is desirable to notice the general scope and purpose of the Act. The object of the Act is to make better provision for the spiritual care of populous parishes. There are several powers and directions given to the Commissioners in the 1st clause, and then, by the 9th section, it points out the mode in which separate districts may be constituted for spiritual purposes, and it specifies to what extent they must be endowed, and enacts, that unless they are endowed to a certain amount (that is, they must not be of less than the annual value of 100*l.*), the district cannot be established. It is therefore a condition precedent, that unless the minister is so endowed, the district cannot be constituted, and, therefore, the endowment must precede the constitution or creation of the district. This scheme must be submitted to the Queen in council, and must be ratified by her before the new district is created. Therefore, the steps are, 1st, the endowment; 2nd, the scheme in consequence of the endowment; and 3rd, this must be submitted to the Queen in council, and sanctioned and approved of by her. Observing that these preliminary steps must take place, the 22nd section, so far as material, is in these words—[*The Master of the Rolls read the 22nd section (a).*]

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(a) *Ante*, p. 422.

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It is to be observed, that the latter part of this section has no effect on this question. It only gives an authority to the Commissioners to hold land in mortmain. But it allows giving the land for two distinct purposes, that is, for the endowment or augmentation of the income of the minister, or for or towards the providing any church or chapel for the purposes of the Act. The first object pointed out by the clause is the endowment, and the second the augmentation. The augmentation, therefore, is only after it is endowed, and, in the first instance, the endowment must take place before the creation or constitution of the district, because until there is a minister sufficiently endowed, the district cannot be constituted at all. It is clear that this is good in the case of a deed, and in the same circumstances, I think it impossible to find any reason why it is not equally good in the case of a will. They are both included in the same sentence. Possibly, in the case of the deed, a man who intended to give land could not settle it until the Commissioners had consented or determined to constitute the new district, but in the case of the devise, it is made without any previous communication with the Commissioners, and thereupon it is for them to determine whether the district ought to be created or not. They, no doubt, are bound to exercise their judgment, according to the best of their ability, in the discharging of the duties imposed upon them; but this Court always acts upon the assumption (and with which it has always had reason to be satisfied), that Commissioners will duly perform their duty. I make this observation with reference to all classes of Commissioners constituted by various Acts of Parliament, and I had to make a similar observation with respect to the Commissioners of Inclosure, in a former case, *Minet v. Leman* (a).

I am

(a) 20 *Bev.* 269.

I am therefore of opinion that this legacy is valid, because the endowment must precede the creation of the district, and the Act of Parliament has rendered this legal, notwithstanding the provisions of the Statute of Mortmain or any other law. In this case, the Commissioners having thought this a proper case for the constitution of the district (which I assume, for I do not know that I have any evidence on the point before me), I am of opinion, on that assumption, that the bequest is valid, and I will make a declaration to that effect.

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TAYLOR v. DEAN.

June 23.

THIS was a demurrer to the Plaintiff's bill for want of equity and for want of parties. The facts were as follows :—

In the case of a Mutual Marine Insurance Company, where the members are numerous, the Court has jurisdiction, on a loss, to enforce contribution and payment of it, either, where the amount has already been ascertained, under the rules, by arbitration, or where it has not been so ascertained.

By deed poll, dated the 5th of February, 1852, a number of shipowners, who were members of a Mutual Marine Assurance Company called "*The Colchester Equitable Ship Insurance Society*," did "make assurance or cause themselves respectively and each such person to be insured in respect of" their ships to the amount specified, "according to the rules and regulations hereinafter in that behalf mentioned or referred to."

By the rules thus referred to, a committee of seven were appointed, who were empowered "to settle and adjust all averages and total losses, and also to settle and determine all controversies and disputes, and all accounts, demands and transactions whatever" between

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the subscribers, and their determination was to be binding and conclusive upon the subscribers, unless the parties required an arbitration.

Rule 11, after providing for the payment by every member, on entering his ship, of a specified premium, proceeded—"The above premiums to be paid into the bank of Messrs. *Round, Green & Co.*, to serve as a capital to pay off, without delay, all losses, damages and expenses incurred by the society, and the same to be drawn by cheque, signed by any two of the committee and countersigned by the secretary; and should any surplus capital remain, after paying all claims and expenses upon or incurred by the society to the end of the year, the same shall be disposed of as shall be agreed upon at the general meeting."

The 39th rule, provided that in cases of mortgage, the owner should give notice thereof to the secretary; and no member should have any claim for any loss sustained by his ship, unless he had procured an undertaking of the mortgagee to pay all premiums, &c. due to the society; "nevertheless such member shall be liable for, and pay his premium, contributions and other demands, the same as any other member and as if such mortgage or assignment had not been made."

By the 47th rule, if any difference should arise between the committee and any member, relative to the amount of any loss or damage, or to a claim for average, two arbitrators were to be named, who were to appoint an umpire or third arbitrator, and the decision of the said third arbitrator was to be conclusive, as far as regarded the *quantum* or amount of damage or remuneration; but nevertheless, the decision of such arbitrators as to such *quantum* or amount should be wholly without

without prejudice to the right of the members to dispute any such claim, in a Court of Law, upon the ground of the unseaworthiness of any ship, at the time of entering into the contract of insurance, &c., or of such claim having been forfeited, by reason of any breach of the rules of the society having been committed, or otherwise. And it was thereby expressly declared to be a part of the contract of insurance, that no member who refused to accept the amount of any damage, as settled by the committee, in full satisfaction of his claim, should be entitled to maintain any action or suit, until the matter in dispute should have been referred to and decided by the arbitrators, and then only for such sum as they might award. Any such submission to reference might be made a rule of either of her Majesty's Courts of Record at *Westminster*, if the Judges thereof should think fit.

In *February*, 1852, Mr. *Taylor* entered and insured his ship, called the *Wrestler*, in the society for 700*l.* The bill stated that no policy for the insurance of the ship was ever delivered to or registered by *Taylor*, it being usually considered, by the members of the said society, to be unnecessary to incur the expense of a policy.

In *August*, 1852, the ship was stranded, and Mr. *Taylor* claimed 700*l.* as for a total loss. This was resisted by the committee, "upon the ground that the ship was not, at the time of her loss, *bonâ fide* in the full and absolute possession of the owner, as named upon the deed of the society;" and upon the ground that it was lost through neglect, if not design, of the master, "and also upon various other grounds."

In consequence of this refusal, a long correspondence took place, and it was ultimately agreed to refer the

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question in dispute to arbitration. Mr. *Gillespie* and Mr. *Bayley* were appointed arbitrators, and they appointed Mr. *Cook* umpire.

Mr. *Gillespie* and Mr. *Bayley* made their award on the 14th of *February*, 1854, whereby they awarded that there was due to the executors of *Taylor*, from the society and the individual members thereof, the sum of 602*l. 1s.* And the arbitrators awarded, that the Defendants, being such committee of the society, should forthwith assess and apportion the sum of 602*l. 1s.* amongst the individual members of the society, according to the rules and regulations of the society, and pay it to the Plaintiffs on or before the 15th day of *May*.

This bill, filed against the seven members of the committee alone, alleged that the Defendants refused to pay the Plaintiffs this sum, or to abide by the award, or to assess and apportion the amount awarded amongst the members of the society, as directed by the award, insisting, by way of excuse, that the ship was, at the time she was insured, mortgaged to Messrs. *Alexander*, of which mortgage *Taylor* had given no notice to the secretary of the society, as required by the 39th rule, and also alleging, that the said ship had been lost in consequence of the misconduct of the master thereof. These allegations were negatived by the Plaintiffs.

The bill also alleged as follows:—"The persons constituting the society are exceedingly numerous, being upwards of 100 at least in number, and such number is so great, and so liable to change and fluctuation, that it is not practicable, without the greatest inconvenience, to make them all individually parties to this suit, and to do

do so, will, in fact, render it impossible to prosecute the same to a hearing."

The bill prayed as follows:—

"**Ist.** A declaration that the Plaintiffs were entitled to be paid the 60*l.* *ls.*, by rateable contribution of the members of the said society.

"**2nd.** Or that an account might be taken of what was due to the Plaintiffs from the '*Colchester Equitable Ship Insurance Society*,' and the individual members thereof liable to contribute in respect of the loss of the ship.

"**3rd.** That the Defendants might be decreed to pay the amount due to the Plaintiffs out of the funds of the society, or to assess and apportion such amount amongst the individual members of the society liable to contribute thereto, and cause the amount to be raised; and that it might be declared, that the proportion assessed on such members as should neglect or refuse to pay the same, constituted charges on their respective ships insured in the society, and also on the general funds and property of the society."

Mr. *Lloyd* and Mr. *F. S. Williams* in support of the demurrer. The members of the committee alone are not sufficient parties to the record. By the second rule of the society the duties of the committee are of a limited nature, and they do not represent the general body of the shareholders in the Association. The deed is peculiar; it constitutes a company with several covenants; it is not a deed of trust, nor are the committee trustees for the shareholders. There is no common or joint liability of the parties who executed the deed; no right to participate

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participate in the profit or join in the loss; it is merely a mutual Insurance Company.

The Plaintiffs are precluded by the award, and their remedy is at law—either upon the award, against the person who referred the matter to arbitration, or on the deed. The amount of the claim is found by the award, and an action at law would lie. The terms of it are very precise, the amount due and the day prescribed on which payment was to be made. A complete personal liability thereby arises, which could and ought to be pursued at law. The only ground of equity suggested by the bill is, that the ship was mortgaged to *Alexander & Co.*, and that no notice was given to the company; but the mortgage was satisfied at the time of the insurance, and therefore the allegation in this respect, although not wholly untrue, was substantially untrue. The object of the bill is to have a declaration of the legal effect of a legal instrument, and is in the nature of a money demand. [*The MASTER of the ROLLS* inquired how contribution could be enforced at common law?] The award being made a rule of Court, an attachment would lie against the individuals forming the committee for nonpayment of the amount due by the award. If proved to be members in the usual way, the rule *nisi* would be ordered to be served upon them. The award is a clear obligation on the members of the committee to pay, and which cannot be evaded by saying that others are liable to pay and contribute. The award must be held to be a valid award, and good in all its parts, and this Court has no jurisdiction to relieve against its effect, although the submission may not have been made a rule of Court; *Davis v. Getty* (a). A bill will not lie to impeach an award

(a) 1 *Sim. & S.* 411.

award made under the Stat. of *Will.* (a), whether the submission, under which it was made, has or has not been made a rule or order of Court before bill filed; *Heming v. Swinnerton* (b). A complete new right has arisen under the award, as much so as if an acceptance to a bill of exchange had been given; *Coffee v. Brian* (c). Another objection arises as to the alternative prayer of the bill, praying an account. This is not a mutual, but a separate account, nor is it a complicated separate account, and therefore it is not sufficient to found the jurisdiction of this Court. If anything, it is simply, a settled account, and a partner may sue for a balance due to him on an account closed, and an agreement to pay the amount; *Foster v. Allanson* (d). The allegation that there are funds of the company at the bankers is too indefinite, it is not alleged that they are sufficient to pay all the different demands against the company. Another objection, which is admitted on the bill, is, that there was no policy of insurance actually effected on the ship. This is in direct contravention of the Stamp Acts (7 & 8 Vict. c. 21, s. 3), and the 2nd rule of the society clearly assumes that policies should be entered into.

Wallworth v. Holt (e); *Nichols v. Roe* (f); *Helme v. Smith* (g); *Hinton v. Meade* (h), and *Venning v. Leckie* (i), were also referred to; and see *Scott v. Avery* (k).

Mr. R. Palmer and Mr. Jolliffe, in support of the bill, were not called upon.

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| (a) 9 & 10 Will. 3, c. 15. | (g) 7 Bing. 709. |
| (b) 2 Phill. 79. | (h) 24 Law J., N. S. (Erch.) |
| (c) 3 Bing. 54. | 140. |
| (d) 2 Term Rep. 479. | (i) 13 East, 7. |
| (e) 4 My. & Cr. 619. | (k) 5 H. Lds. Cas. 811. |
| (f) 5 Sim. 156. | |

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I think the demurrer to this bill must be overruled. The case proceeds on the assumption either that there was a good and valid award made under the regulations of this company, or that there was no award at all, and it is pressed upon me that I must allow this demurrer, as there is no probability that I could grant the Plaintiffs any relief at the hearing of the cause.

The first paragraph of the prayer proceeds on the assumption that the award has settled the amount, and the second asks for an account, and the bill therefore seems to be framed with a view to meet each case.

Assuming that the award is not binding, that it does not affect any one, and that it cannot be supported, then it would leave the parties as if there had been no reference or award, and, consequently, the case is of the ordinary character of an Insurance Company, in which a number of persons have associated together, for the purpose of mutual insurance of their vessels and bearing the loss. I am of opinion that in such a case, one member is entitled, as against the others, to have an account of what is due to him, and to enforce contribution against the others independently of any remedy by action at law.

On the other hand, assuming the award to be binding, it is an award made under the provisions of the 47th rule of this association, which merely provides for a determination of the amount of the loss sustained, and leaves all other questions open between the parties. It only settles the amount of loss to be paid, by contribution, by the other parties. The award directs an assessment and apportionment of the sum found by the award

award to be due, to be levied on all the parties, but this can only be properly carried out by the intervention of a Court of Equity.

I wish to reserve, until the hearing, my judgment upon the several minor points which have been raised during the argument. As to the surplus at the bankers, I cannot now say that the Plaintiffs may not be able to make out a case for relief at the hearing. I refrain from making any observation on whether it is necessary to make the award a rule of Court; I am not aware that any time is limited for that purpose. The case may be analogous to those where the act may be done at any time before the hearing, as in the case of a plea for want of a personal representative, and the plea is replied to, and at the hearing there is a legal personal representative, who has been appointed subsequent to the filing of the plea, which this Court has held sufficient. Nor do I express any opinion as to the effect of the Stamp Acts requiring a stamped policy of insurance to have been entered into; or whether any policy was necessary. Those questions must also be reserved for the hearing. On the facts stated in this bill, I think, on proving them, the Plaintiffs would be entitled to some relief, and upon the facts I do not see in what manner the Plaintiffs' rights could be enforced at common law without great expense and inconvenience, which this Court would lend its aid to prevent.

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Demurrer overruled.

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*June 30.*

Under the third-party clause (6 & 7 Vict. c. 73, s. 39) it is not necessary, where a *cestui que trust* applies for taxation of bills paid by trustees or executors, to shew that there are fraudulent over-charges.

Taxation ordered at the instance of a legatee, of a bill of costs of the executors' solicitor, for the amount of which a mortgage had been given by them.

THE Petitioner, Mr. *Barker*, was, under the will of his father, interested in his estate. He attained twenty-one on the 16th of *August*, 1855.

The two executors of his father's will employed Mr. *Drake*, of *Exeter*, in the matters connected with the estate, and in a suit for its administration. An order was made for the sale of the testator's leaseholds, and of a house, No. 15, *West Street*, devised to the Petitioner, but to which the testator was entitled, subject to a mortgage.

The sale took place in *London*, and Mr. *Drake* attended the sale. The executors purchased the house on behalf of the estate, and they borrowed a sum of 87*l.* from Mr. *Drake* to enable them to complete the purchase.

On the 10th of *October*, 1855, Mr. *Drake* delivered to the executors his three bills of costs, amounting in the whole to 147*l.* 7*s.* 6*d.*, and a cash account shewing (including the cash advances) a balance of 214*l.* 8*s.* 7*d.* due to him.

On the 20th of *October*, 1855, one of the executors, accompanied by a solicitor's clerk, examined and approved of the accounts, and expressed a desire that Mr. *Drake* would accept a mortgage of the premises in *West Street* for five years, for the balance due on such account. This he agreed to do, "upon the understanding

ing that it was to include the amount due on the bills of costs, as delivered, and also the costs for preparing the mortgage deed, and that the bills of costs should be allowed as correct, and all accounts settled to the time of taking such mortgage."

The executors assented, and on the 17th of *November*, 1855, executed a mortgage of the house for securing 225*l.*, and they paid interest on this mortgage in *February* and *April*.

The four bills of costs and a copy of the mortgage were, in *February*, 1856, sent by the executors to the Petitioner.

The Petitioner, who, as has been stated, had attained twenty-one in *August*, 1855, now presented this Petition for the taxation of the bills of costs.

He alleged "that the bills of costs contained numerous unreasonable and extravagant charges, and that the circumstances under which the mortgage was given for the amount of the bills of costs, and the unreasonable and extravagant charges contained in the first bill, were special circumstances which justified the Court in referring such bill for taxation."

"That, in particular, the first bill contains various charges which ought not to have been made or inserted at all, that is to say :—

"1. Various charges, amounting altogether to the sum of 8*l.* 3*s.* 8*d.*, for writing letters to the [London] agent of Mr. *Drake*, and perusing letters to Mr. *Drake* from his agent.

"2. Various

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"2. Various charges, amounting altogether to the sum of 4l. 4s. 2d., for perusing and making close copies of the copies of various papers in the suit of *Barker v. Hilbert* [the administration suit], sent to Mr. Drake by his agent, and charged for in the second bill of costs.

" 3. Two charges, amounting to 12*l.* 16*s.*, for Mr. *Drake* going to *London* to attend the sale ordered in the suit of *Barker v. Hilbert*, which journey was wholly unnecessary and improper."

It also specified three other small items, amounting in the whole to 1*l.* 14*s.* 4*d.*

"That the first bill contains many extravagant charges for business done, exceeding the amount which ought to be charged, as, for example, '11th December, 1854.—Drawing and fair copying assignment of Lot 1 purchased by you, six skins, 8*l.* 5*s.*', and that such charges would be greatly reduced on taxation."

The affidavit of the Respondent's clerk stated, that one of the executors expressed to him his desire and instructions that Mr. *Drake* should attend the sale of the property in *London*.

*Mr. R. Palmer* and *Mr. Batten*, in support of the Petition, argued that the bills of costs ought to be taxed under the third-party clause (*a*), the bills having been settled unknown to the Petitioner, and items of over-charge being clearly proved.

As to the attendance in *London*, they cited *Alsop v. Lord Oxford* (*b*); and see *In re Bevan* (*c*).

Mr.

(a) 6 & 7 Vict. c. 73, s. 39. (b) 1 Myl. & K. 564.  
(c) 20 Beav. 146.

**Mr. J. H. Palmer, contrd.** The executors themselves would not be entitled to taxation, for after an account has been settled and a mortgage given, it cannot be opened except by bill; *Barwell v. Brooks* (*a*). In that case it was held, that where the amount of a bill of costs had been included in a settled account between a solicitor and client, and retained by the solicitor out of moneys in his hands, the Court had no jurisdiction, upon Petition under the 6 & 7 Vict. c. 73, to open the account and order taxation, and that it could only be done by bill.

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Here a mortgage security was given a month after the delivery of the bill, at the request of the clients, both for the costs and for money advances, and whereby they gained a forbearance for five years. The *cestui que trust* stands in the situation of the executors, for the right given to third parties by the Act does not alter the relation of solicitor and client; *In re Massey* (*b*). *In re Neate* (*c*), Lord Langdale, in a similar case, says:—"He comes as *cestui que trust*, asking that the bill may be taxed; the taxation is to take place, not as between him and the solicitor, but as between the solicitor and the trustees, his clients; and the question is, if the trustees themselves could obtain the order which is now asked, not by them, but by a party deriving his power to tax solely under the Statute. I have stated over and over again, that the Statute does not alter the relation between solicitor and client; and though it gives the *cestui que trust* a right to tax a bill which is payable out of his moneys, yet it does not entitle him to say, that the solicitor is not entitled to receive all that is due, as between him and the trustees, his clients."

So

- (*a*) 8 Beav. 121.      (*b*) 8 Beav. 458.  
                           (*c*) 10 Beav. 181.

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*In re
Drake.*

So in *Re Whitcombe* (*a*), it was held, that a “settlement of a bill of costs between a solicitor and client, upon a special agreement, precludes an order being made upon petition for taxation. The agreement must first be set aside by suit before the matter can be reopened.”

The over-charge complained of must be fraudulent to authorize a taxation after payment; *In re Currie* (*b*); *In re Barrow* (*c*). The journey to *London* was authorized, and ought to be paid for; *In re Pender* (*d*).

The MASTER of the ROLLS.

There is a mistake on the part of the Respondent in supposing that this Court will not order the taxation of a bill of costs after the client who is liable to pay has paid or settled the bill in account.

By the 41st section, the Court is precluded from ordering taxation after payment, except under “special circumstances;” but that exception does not apply to cases under the 39th section, called the third-party clause, in which no mention is made of “special circumstances.”

If the executors had applied to have these bills taxed, I should not have opened the matter, or have allowed them to be taxed, but should have dismissed their Petition with costs. But here the case is this:— Executors, who acted in the business for the Plaintiff, their *cestui que trust*, agree that the bills of their solicitor shall be so much, and give a mortgage for the amount

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(*a*) 8 *Beav.* 140.
(*b*) 9 *Beav.* 609.

(*c*) 17 *Beav.* 556.
(*d*) 10 *Beav.* 390.

The *cestui que trust* says, "I am entitled to have the bills taxed under the 39th section," which expressly refers to the case of a bill which an executor "may have paid," and which does not require special circumstances to be shewn. This case cannot be put higher than if the money had been actually paid: then, under the 39th section, the Petitioner on this occasion, whose estate is made liable, would be entitled to have the bill taxed.

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I think that a taxation is almost a matter of course, assuming that items of over-charge are proved, and that it is not necessary that the over-charges should be such as to amount to fraud. This is only required under the other clause.

It is said, that if I order taxation, I shall open a mortgage transaction. I express no opinion whether the mortgage is good or not. I find certain executors have instituted in this Court a suit for the administration of an estate; they have not had the amount of their bill of costs ascertained by taxation, but have made an arrangement with their solicitor, after the *cestui que trust* came of age, by which they have fixed the bill at a certain amount. I do not say whether the mortgage is good or not, but I think that the Petitioner is entitled to have ascertained, by taxation, what is properly due. The trustees may have to pay the overcharge, if any, out of their own pocket. I express no opinion on that.

The bills to be taxed are those which the Petitioner is liable to pay, and when he seeks taxation of the bills, he admits his liability to pay them.

I will make an order for the taxation of the three bills of costs.

- NOTE.—See *In re Dixon, L. Justices*, 8 Dec. 1856.

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July 9, 12.

A lady had a general power of appointing a trust fund by deed or will, and in default, half was limited to *A.* and the other to *B.* By her will, she appointed the fund to her executor and made it chargeable with her debts and some legacies, and she gave half the residue, composed of the appointed fund and her own property, to *A.* *A.* predeceased the testatrix and the bequest to him lapsed. Held, that the moiety of the fund subject to the power thus appointed in favour of *A.* passed to the appointor's next of kin, as part of her estate undisposed of, and not to the executors of *A.* as in default of appointment.

CHAMBERLAIN v. HUTCHINSON.

IN 1816, by the settlement made on the marriage of Mr. and Mrs. *De Blanchy*, Mrs. *De Blanchy* assigned to trustees all her personal estate upon trust after the death of herself and her husband, and in default of children of the marriage (which happened), to pay the trust moneys to such persons, &c. as Mrs. *De Blanchy* by deed or will should appoint, and in default upon trust to pay one-half part to *William Knight Thompson*, and the other half to *Martha Maria Thompson*, his sister.

In 1823, *Ann Adams*, the mother of Mrs. *De Blanchy*, by her will, gave her daughter a life interest in considerable property, and after her decease, the same was to be in trust to pay one-half of the trust moneys to such person as Mrs. *De Blanchy*, by deed or will, should appoint, and in default to the children (if any) of her daughter, and in default thereof, upon trust to pay the same to the testatrix's grandchildren *William Knight Thompson* and *Martha Maria Thompson*, in equal shares.

Mrs. *Adams* (the mother) died in 1832, and in 183 Martha Maria Thompson married Mr. *Bainbrigge*.

Mrs. *De Blanchy* made her will in 1842, and thereafter directing her just debts and funeral and testarary expenses to be paid, and after referring to powers both under the settlement and will, she pointed all the personal estate and effects whic

had the power to dispose of to the Plaintiff (her executor), upon trust to convert such securities, personal estate and effects into money, and dispose of the same in manner therein following. She then gave several pecuniary legacies, "and as to one moiety of all the rest, residue and remainder of such moneys and property as she was then entitled to appoint, and all other moneys, securities for moneys, personal estate and effects not thereinbefore disposed of," she gave it to her executor, upon trust for her niece *Martha Maria Bainbrigge* for life, with remainder to her children. And she gave the other moiety to *William Knight Thompson* absolutely.

Mrs. De Blanchy survived her husband, and died in 1853, and there had been no children of the marriage.

Martha Maria Bainbrigge died in 1844, leaving children.

Wm. Knight Thompson died in 1847, in the lifetime of *Mrs. De Blanchy*, whereby the bequest to him lapsed.

The question was, to whom the lapsed moiety belonged. The Defendant *Charlotte Hutchinson*, one of the next of kin of *Mrs. De Blanchy*, claimed the whole moiety on behalf of herself and the other next of kin of *Mrs. De Blanchy*. The Defendants *Bainbrigge* and others, though they admitted the claim of the next of kin to such portion of the lapsed moiety as belonged to *Mrs. De Blanchy* in her own right, insisted on their right, as representing the executors of *W. K. Thompson*, to the other portion, as being subject to the trusts of the marriage settlement and of her mother's will, according to which trusts, in default of appointment

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1856.      by Mrs. *De Blanchy*, the trust funds were limited to  
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This bill sought to have the rights of the several parties ascertained and declared.

Mr. *Roupell* and Mr. *Hingeston* for the Plaintiff, the executor and trustee.

Mr. *Follett* and Mr. *Field*. The exercise of the power as to one moiety failed altogether, for *Wm. Knight Thompson*, in favour of whom the appointment by Mrs. *De Blanchy's* will was made, having died in her lifetime, the bequest in his favour altogether lapsed. The object of the testatrix has failed, and therefore the case is to be regarded as if there had been no exercise of the power; and the parties, who in default of the exercise of any power would take, are now entitled. The legal appointment to the executor does not vary the case, for it must be considered as if the bequest had been made directly to the appointee; there could be no intention to benefit the executor. The moiety to *W. K. Thompson* was not well appointed, and it became, therefore, subject to the trusts of the original marriage settlement; *Easum v. Appleford* (a). It is true, by the attempted appointment, creditors might be let in; *Jenney v. Andrews* (b); but only to the extent of debts against the estate of the donee of the power (c), and here there are none.

Mr. *Selwyn* and Mr. *Roget*, for parties in the same interest.

Mr.

(a) 10 *Sim.* 274; *S. C.*, on appeal, 5 *Myl. & Cr.* 56. (c) 2 *Sug. on Powers*, 6th edit. 29, and 1 *Sug. Pow.* 123.
 (b) 6 *Madd.* 264.

Mr. *R. Palmer* and Mr. *A. J. Lewis*, *contra*, contended that the testatrix had properly exercised the power. Every part of the will shewed her intention to make the fund part of the general estate, and the Plaintiff, her executor, took it as part of her personal estate, but in trust as to the undisposed of portion, for her next of kin; *Long v. Watkinson* (*a*).

2ndly. By sect. 27 of the Wills Act (*b*), a general power of appointment of personal estate must be construed to include all personal estate over which the testator may have a disposing power, and to hold, in the present case, that the parties who would have been entitled if there had been no exercise of the power of appointment, are now entitled, would be to repeal that part of the statute. The Plaintiff takes the fund in his character of trustee for all parties entitled under the will of the testatrix. The fact that *W. Knight Thompson* would take it in default of the execution of the power, is a fair ground of argument for shewing that the intention of the testatrix was to deal with it as her own property; *Williams v. Lomas* (*c*).

Mr. *Follett*, in reply, referred to *Ripley v. Waterworth* (*d*), and the observations of Mr. *Chance* on *Mansell v. Price* (*e*).

The MASTER of the ROLLS.

July 12.

At the time the testatrix made her will, she had a power of appointment over one fund under her marriage settlement,

- (*a*) 17 *Beav.* 471.
- (*b*) 1 *Vict. c.* 26.
- (*c*) 16 *Beav.* 1.
- (*d*) 7 *Ves.* 425.

- (*e*) See Appendix to *Sugden on Powers*, No. 21, 6th edit.; 2 *Chance on Powers*, 483.

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settlement, and over another fund under her mother's will, and she had property of her own. The question is, whether the bequest of the moiety, which lapsed by the death of Wm. Knight Thompson in the lifetime of Mrs. De Blanchy, goes to her next of kin as residue of Mrs. Thompson, as in default of appointment. I am of opinion it goes to the next of kin of Mrs. De Blanchy, and not to the representatives of Wm. Knight Thompson, as in default of appointment.

In the first place, there is a general appointment of it by the will to her executor, so as to make it part of her personal estate, and an express direction to pay certain legacies out of the appointed fund. She treats the whole as part of her personal estate, and blends the whole so as to make it part of her general personal assets, and liable to the payment of her debts, legacies, costs of administration and probate, and all other charges which necessarily fall on the general personal estate.

This is a question of intention: in what way is it possible to hold, that if this gift, which was for the benefit of Wm. Knight Thompson, should fail, it should go as if she had made no appointment at all, instead of forming part of her personal estate, and passing, if not otherwise disposed of, to her next of kin. By her will, she has made it part of her personal estate, and she is to be presumed to be cognizant of the law which makes it devolve as part of her property undisposed of.

It is said, apportion the funds. If I accede to the argument of the Defendants, see to what consequence I must ascertain what part was her personal

personal property, and what part was subject to the two powers, and I must then apportion the charges between them.

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I am of opinion, that it does not go as in default of appointment, but to her next of kin as part of the residue undisposed of, and I will make a declaration to this effect.

HARTLEY v. OSTLER.

July 8.

BY his will, dated in 1838, the testator devised the messuage in which he resided to his son *William Wright*, subject to a life annuity of 16*l.* to the testator's brother *John White*.

The testator bequeathed to *A.*, for her life, an annuity of 10*l.*, the annuity of 19 guineas upon the death of *A.*, and the annuity of 50*l.* when the mortgage on his estate should be reduced to 500*l.*, "and which respective sums of 10*l.*, 19 guineas and 50*l.*, as the case might be, were to be paid" half-yearly. Held, that they were cumulative.

And he devised other lands to trustees, upon trust to pay the legacies and annuity thereafter given. He likewise gave and devised unto *Sarah Ostler* and her assigns, for and during the term of her natural life, the annuity or yearly sum of 10*l.*, clear of all deductions, the annuity or yearly sum of 19*l.* 19*s.* upon the death of *John White*, and the annuity or yearly sum of 50*l.*, so soon as the mortgage money upon the estate at *Stow* should be reduced to 500*l.*, and which respective sums of 10*l.*, 19*l.* 19*s.* and 50*l.*, as the case might be, were to be paid to the said annuitant or her assigns by his said trustee, his heirs, executors or administrators, in equal half-yearly payments, the first half-yearly payment to commence and be made at the end of six calendar months next after his death, in regard to the said sum of 10*l.*, and in regard to the said sum of 19*l.* 19*s.*, and 50*l.*,

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50*l.*, at the end of six calendar months next after the other two respective events should take place. And in case *Sarah Ostler* should happen to depart this life leaving *Thomas Ostler* her surviving, he gave and devised unto him the said *Thomas Ostler* the annuity or yearly sum of 10*l.*

The question was, whether these annuities were cumulative or substitutional.

Mr. *R. Palmer* and Mr. *Faber*, for the Plaintiff.

Mr. *Shebbeare*, for the Defendant.

The Master of the Rolls.

This is a very peculiar case, and it is evidently impossible to do more than guess at what the testator meant. He might have made it perfectly clear by saying "a further annuity of," or he might have said "to be increased to the annuity of;" there would then have been no sort of obscurity about it. But I think he meant them to be cumulative, and I think so upon two grounds. In the first place, I can only read the words "as the case may be" where it occurs in the sentence, "and which respective sums of 10*l.*, 19*l.* 19*s.* and 50*l.*, as the case may be, are to be paid to the said annuitant," as meaning that of the annuities of 10*l.*, 19*l.* 19*s.* and 50*l.*, one or two or three, as the events may happen, may have to be paid. The only way in which I can concur in the construction contended for by the Plaintiff is by turning the word "and" into "or;" but it is only in cases where that is required to be done in order to make the sense intelligible and consistent, that the Court adopts that course; and this is not one of those cases.

I am

I am also of opinion, that some weight is to be attached to the argument as to the order in which the events arise. An annuity of nineteen guineas is given upon the death of *John White*. Assume it to be substitutionary, and that he survived the period when the mortgage money was reduced to 500*l.* It is clear, upon this view of the case, that then the annuity of 10*l.* would be increased, by substitution, to an annuity of 50*l.*; but then (although it might be very whimsical and capricious), if *John White* were afterwards to die, the annuity of 50*l.* would, in that event, be reduced to 19*l.* 19*s.* I must either so hold, or else that the annuities are cumulative. Though the testator must have anticipated the possibility of *John White* surviving the period when the mortgage money was reduced to 500*l.*, in which case there was an annuity of 50*l.* given; yet he directs an annuity of nineteen guineas to be paid, not in case *John White* should die before the mortgage money is reduced to 500*l.*, but whenever that event occurs. This, I think, confirms the view I take, that the proper construction is, that these annuities of 10*l.*, 19 guineas and 50*l.* are cumulative and not substitutionary, and I make the declaration accordingly.

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*June 2, 4, 9.*

*A. B. made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative who acted as his solicitor. The Court considered that A. B. intended to reserve a power of revocation, but that the deed was in other respects unobjectionable.*

*A. B. made his will, prepared by the same solicitor, making a general devise, but not revoking the settlement. The Court then held, that it was the duty of the solicitor, when he prepared the will, specifically to have asked the*

*testator whether he intended to revoke the deed, and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the Court decided, that although the deed would have been operative if A. B had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise contained in the will.*

*A party in possession of an infant's estate, under a voidable deed, treated as made to account for the rents for more than six years before the filing*

## NANNEY v. WILLIAMS.

THE object of this bill was to cancel, at the suit of the heir and devisee of the settlor, a voluntary conveyance of an estate, called "the *Yspytty* estate," in the county of *Denbigh*, which was dated the 6th of *November*, 1832.

The documents and evidence were of a very voluminous character, and it is therefore necessary to compress the statement of the case, by adopting, as far as possible, the conclusions to which the Court came upon the evidence. On this assumption, the material circumstances were as follows:—

In 1829, the testator, the Rev. *John Nanney*, having no issue by his first marriage, and being of the age of sixty-four, married *Ann F. Fisher*, and he had issue a daughter born in 1831, but who died in the same year. In the year 1832, the state of his family was as follows:—He had a wife who was still a young woman, he had no children, and he had a younger brother, Sir *William Wynn*, on whom he had voluntarily settled life annuities amounting in the whole to 1,000*l.* a year, and

a nephew

testator whether he intended to revoke the deed, and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the Court decided, that although the deed would have been operative if A. B had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise contained in the will.

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a nephew *Robert Chambre Vaughan* (the son of a deceased sister), on whom he had settled an annuity of 800*l.* a year.

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Besides real estate, which produced between 3,000*l.* and 4,000*l.* a year, he had also the *Yspytty* estate of the value of about 640*l.* a year. His principal solicitor was the Defendant Mr. *Williams*, a relation by blood, who had been concerned for him from the year 1821, and with whom, from his boyhood, the testator had been on terms of intimate and affectionate friendship. In 1832, the testator wrote several letters to Mr. *Williams*, requesting him to meet him at *Liverpool* early in *July*. They accordingly met there, and remained together two or three days. The testator then verbally instructed Mr. *Williams* to prepare a deed to settle the *Yspytty* estate as after mentioned. A settlement was accordingly prepared in Mr. *Williams's* office in *London*, by Mr. *Searle* his clerk; *Searle* read over the draft to the testator, and afterwards read the engrossment to him at the time of its execution, but whilst reading the recital in the deed, which stated that the testator "was desirous of *irrevocably settling*" the estate, the testator objected to that word. The first syllable of the word "*irrevocably*" was then erased, and the deed was executed by the testator, containing the word "*revocably*." According to the evidence of *Searle*, "no explanation of the deed was at this time given to the testator, either by Mr. *Williams* or by himself," but after the deed was executed the testator said, "Well *Williams*, I think I have done handsomely by you."

*Searle* in his evidence also said, that on the execution of the deed, "nothing was said about introducing a power of revocation. I never drew a revocable settlement before. I considered that it made no difference whatever,

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whatever, whether it stood *revocably* or *irrevocably*; it was no more binding on Mr. *Nanney*, if it stood as originally drawn, than it was when altered, if he chose, any more than if it had been in a will, and it had been said it was his *irrevocable* intention."

This deed of settlement of the *Yspytty* estate was dated the 6th of *November*, 1832, and was made between the testator of the first part, his brother Sir *William Wynn* of the second part, and a trustee of the third part. It recited the *seisin* of the testator, and that he was about to levy a fine of the estate, and "was desirous of *revocably settling*" the said estate, "in the manner thereafter particularly mentioned, the uses of which the testator was then desirous of declaring." The indenture then witnessed, that the testator, "in consideration of the natural love and affection" which he had to his brother Sir *William Wynn*, and "unto his kinsmen" Mr. *Williams* and *Simon Hart Wynn*, "and for other good causes and considerations," and in consideration of 10*s.* paid by the trustee, conveyed the *Yspytty* estate to the trustee in fee, to the use of the testator for his life [omitting the words, without impeachment of waste], with remainder [omitting all estates to the testator's issue] to his brother Sir *William Wynn* for his life, "without impeachment of or for any manner of waste;" with remainder to the use of the first and other sons of Sir *William Wynn* in tail male; with remainder to the use of Mr. *Williams* for his life, without impeachment of waste; with remainder to the use of *Simon H. Wynn* for his life, without impeachment of waste; with remainder to the use of the second son of *Robert Chambre Vaughan* for his life, without impeachment of waste; with remainder to his first and other sons in tail male; with remainder to the use of the right heirs of the testator. The testator ther  
covenante

covenanted to levy a fine, which was to enure to the above uses, and he entered into *absolute* covenants with the trustee for the title of the estate, and for the quiet enjoyment thereof.

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Omitting the usual limitations to trustees to preserve, this was, in substance, the whole effect of the deed, for it contained none of the usual powers to lease, to jointure, to raise portions, &c.

After this, the Plaintiff (the only son of the testator) was born on the 15th of *July*, 1833, and the testator subsequently had a daughter, who was born in 1835, and died in the following year.

The testator's wife died in 1837, and the testator died in *March*, 1838, leaving the Plaintiff, an infant, his heir. By his will, dated the 2nd of *January*, 1838, the testator devised all his real estates to the use of the Plaintiff for his life, without impeachment of waste; with remainder to trustees during the life of the Plaintiff to preserve contingent remainders; with remainder to the use of the first and other sons of the Plaintiff in tail male; with remainder to the use of the daughters of the Plaintiff as tenants in common in tail, with cross remainders among them in tail; with remainder to the use of Sir *Wm. Wynn* for life; with remainder to his issue, if any; with remainder to the use of *Simon Hart Wynn* for life, with remainder to his issue as therein mentioned; with remainder to the use of *Harriett Wynn* for life, with remainders to her issue as therein mentioned; with remainders to the use of *Sarah Kirkby* for life, with remainders to her issue male as therein mentioned; with remainder to the use of the Defendant *Mr. Williams* for his life, with remainder to his issue as therein mentioned; with remainders over.

This

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This will was prepared by Mr. *Williams* from verbal instructions. He said in his evidence, that "nothing was said when he took the instructions about the *Yspytty* estate in particular. The instructions were to devise all his estates. I did not remind him of the deed settling the *Yspytty* estate. I was aware of it, but never mentioned it, nor did he mention it."

The testator, who was greatly displeased with his nephew *Robert Chambre Vaughan*, made a codicil, dated the 16th of *January*, 1838, whereby "he expressly and solemnly declared and directed," that his nephew and his issue should be totally and for ever excluded from taking any interest in his real or personal estate.

The Plaintiff attained twenty-one in *July*, 1854, and on the 8th *November*, 1854, he filed this bill to set aside the settlement of the *Yspytty* estate, and for consequential relief.

Pending the suit the Defendant Sir *Wm. Wynn* died without issue.

Mr. *R. Palmer*, Mr. *Cairns* and Mr. *Rowcliffe*, for the Plaintiff.

*Cooke v. Lamotte*(a); *Hoghton v. Hoghton*(b); *Meadows v. Meadows*(c); *Bulkley v. Wilford*(d); *Holman v. Loynes*(e); *Billage v. Southee*(f); *Russell v. Jackson*(g) were cited; and *Hicks v. Sallitt*(h), as to the effect of time.

Mr. *Lloyd*, Mr. *Selwyn* and Mr. *Giffard*, for Mr. *Williams*, cited *Palmer v. Newell*(i); *Pomfret v. Perring*(k)

M

(a) 15 *Beav.* 234.

(f) 9 *Hare*, 534.

(b) *Ibid.* 278.

(g) *Ibid.* 387.

(c) 2 *Beav.* 401.

(h) 3 *De G., M. & G.* 78

(d) 1 *Beav.* 220.

(i) 20 *Beav.* 32.

**Mr. Follett** and **Mr. Humphreys**, for the Defendant  
*Vaughan*, cited *Hindson v. Weatherill* (a).

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Mr. Roupell and **Mr. Simpson**, cited *Dormer v. Forrescue* (b).

The Master of the Rolls.

Mr. Palmer, I will not trouble you to reply in this case, for, after reading and carefully considering the evidence, I am of opinion that, in the events which have happened, the deed of the 6th of November, 1832, does not operate to give any estate to the Defendants.

I am very far from saying that a deed of gift to a solicitor from his client may not be perfectly good; I see no objection to this deed on that account. Mr. Nanney, the settlor, was a man not likely to be much influenced by any one; and I see no trace of the possession, by Mr. Williams, of any great degree of influence over the testator; he had undoubtedly a high opinion of that gentleman's capacity, but he was not, in my opinion, much disposed to yield to any one. I am also of opinion, that the testator intended to settle the *Yspyddy* estate, that he gave directions for that purpose to Mr. Williams at the *Liverpool* races, that he inquired about it subsequently, and that he freely, and of his own accord, gave instructions for the preparation of the deed, when he came to *London* in the month of November, 1832. I think that the insertion of a life estate to the Defendant Mr. Williams does not invalidate the deed, and I am satisfied that the draft of the deed and the deed itself were read over to the settlor, and that he understood the limitations as well as an unprofessional man could be supposed to do.

Now,

(a) 5 *De G., M. & G.* 301.

(b) 3 *Atk.* 124.

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Now, having said this, in order that my views may not be mistaken, every word of which is in favour of the Defendants, I have, notwithstanding all this, on Mr. *Searle's* evidence, taken in conjunction with the subsequent conduct and proceedings of the testator and the evidence of Mr. *Williams* himself, come to this conclusion :—that this is not an operative deed against the testator, or any person claiming under him through his will.

The grantees under the deed are mere volunteers, taking therefore only the benefit which the testator intended to give them ; and if it be proved that the deed omits a material provision which the settlor considered to be indispensable, the deed can only stand with such intended provision incorporated in it. It appears from all the evidence, both previous and subsequent, that the testator was a man who was constantly making wills, and altering the disposition of his property. He seems to have been aware of this peculiarity of his mind, for he occasionally refers to it, and he seems never to have intended to have deprived himself of the power of altering the disposition of his property. This is shewn throughout his life, and it was therefore extremely improbable that he should intend to make an irrevocable disposition of the *Yspyty* estate. This disposition to reserve a power of alteration is proved in the most unequivocal manner to have existed in the case of the settlement in question. It is true he did not, when the draft was read over to him, notice the recital, which stated it was intended to be an *irrevocable* disposition of the *Yspyty* estate. This shews also that he did not pay very close attention to it when it was so read over to him. When, however, the engrossment was read over to him, he did, and the account given by Mr. *Searle* in his evidence is this :—“ I now recollect that

Mr.

Mr. *Williams* was present. It has come to my recollection. I remember whilst I was reading the deed, and when I came to the recital that Mr. *Nanney* was desirous of 'irrevocably' settling the estate, an objection was taken to that word, and I think the first syllable was erased. It is probable that Mr. *Williams* then said that it should stand 'revocably,' so that Mr. *Nanney* should have a power of revoking it at any time. I remember Mr. *Williams* saying something to that effect. It is my recollection of some such remark having been made by Mr. *Williams* that enables me to fix on the fact, that Mr. *Williams* was present." Later in his evidence he says this:—"When the deed was executed, my impression is, that Mr. *Nanney* was the person who objected to the word 'irrevocably.' His objection was, that he did not mean that that word should stand. His objection was to that effect. I do not remember that he assigned any reason, but clearly his object was that he would not be positively bound by that deed as a permanent settlement. I am satisfied he was the person who objected, as far as my memory goes. I think that Mr. *Williams* said, it should be altered. I do not remember myself saying anything on the subject; but I think I suggested the erasure of the first syllable, but I do not remember distinctly. I recollect Mr. *Williams* telling me to make that alteration, or saying something to that purport." A little later he says:—"In consequence of Mr. *Nanney's* objection, the first syllable of the word 'irrevocably' was erased in the deed; but I cannot say whether by myself, *Goslick* or Mr. *Williams*. It was done in the same room before Mr. *Nanney* executed the deed. Nothing was said about introducing a power of revocation. I never drew a revocable settlement before. I considered that it made no difference whatever, whether it stood 'revocably' or 'irrevocably'; it was no more binding on Mr. *Nanney* if it stood as originally

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originally drawn, than it was when altered, if he chose, any more than if it had been in a will, and it had been said it was his 'irrevocable intention.'

This evidence is, in my opinion, of the greatest importance. In the first place, it shews, that but for the introduction of this recital, the settlor would have executed the deed without any question. It also confirms what is expressly sworn to by Mr. *Searle*, and is also confirmed by Mr. *Williams*, namely, that no explanation was given to the settlor of the draft, or the limitations contained in the deed. Mr. *Searle* says, it required none; it explained itself; but the draft as it stood made an *irrevocable* settlement of his *Yspytty* estate, although he should subsequently have had three or four children born to him, a matter certainly not improbable, for his wife was then a young woman, and subsequently bore him two children.

Now, did the draft, as it stood, explain to him that his issue, if he had any, would be irrevocably excluded from enjoying that estate? It is said by Mr. *Searle*, and the same view is adopted by the Counsel for the Defendants, that, from the deed itself, Mr. *Nanney* would know everything that it was necessary for him to know. But I then asked these questions:—Did he know, from the deed itself, that he could not alter it? Did he know that he could not cut a tree? Did he know that he could not open a mine? That he could not grant a lease to extend a day beyond his death? Did he know, that at law at least, if not in equity, if a stranger were to evict him by a paramount title and obtain possession of the estate, his personal estate would be liable to the value of it, under the covenants for title? I think all these questions must be answered in the negative. It is obvious that he

what almost all unprofessional persons and some professional persons do, he gave instructions to his solicitors to prepare a settlement of his estate; he trusted the rest to him, and trusted that his solicitor would give him the necessary information and explanation, and enable him to carry his intention into effect.

One of the grounds mentioned by the Lord Justice *Knight Bruce* in *Hindson v. Weatherill*(a), with respect to invalidating a voluntary deed, is, that the solicitor of the settlor omitted to perform a duty, which was incumbent on him in his character of solicitor. Now, adopting this view of the case, I inquire, is any such omission of the performance of a duty incumbent on the part of Mr. *Williams*, as the settlor's solicitor, to be found in this case? The first question that would naturally be asked a client, by the solicitor who had received instructions to prepare the voluntary settlement of his estate, would be this:—Do you mean it to be revocable or irrevocable? This question seems never to have been asked, it is not alleged by Mr. *Williams* that he ever asked that question. It is inconsistent with the whole of the evidence that any such question should have been asked. It was, in my opinion, the duty of Mr. *Williams* to have satisfied himself on this point. It was also, in my opinion, his duty to explain to him the effect of his life estate being impeachable of waste, of the absence of any leasing power and of the absolute covenants for title. But the most serious omission is still to be noticed. When, on the execution of the deed, the settlor stated that he did not intend to settle the estate irrevocably, was it not the duty of Mr. *Williams* (for I am satisfied he was present on the occasion) to have asked the settlor, in what way he intended the deed should be revocable? Should he

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not

(a) 5 *De G., M. & G.* 301.

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not have informed him, that the omission of those two letters left it extremely doubtful whether the deed would be revocable or not; and that, at least, it would require a suit in the Court of Chancery to reform the deed to make it conformable to his wishes; that all the grantees of his bounty must be parties to such a suit; that the costs of it would fall on him, and that a question would arise as to the nature and extent of the power of revocation to be reserved in the deed. Nothing of this was done, but the deed was allowed to remain in its altered state, merely omitting two letters.

I regret to state, that the omission on the part of Mr. *Williams* to perform the duty incumbent on him, as the solicitor of the settlor, does not appear to me to rest there, as I shall have occasion to observe, when I come to the consideration of what occurred during the preparation of the will of the settlor in 1838.

But I proceed further with the consideration of the deed, as it stands with the altered recital. The Defendant's counsel say, they are willing to have the deed treated as a revocable deed; that is, as if an express power of revocation had been introduced into the deed, enabling Mr. *Nanney*, the settlor, to alter this deed by another deed or by his last will and testament, and they say, that the case cannot be put higher or more favourably to the Plaintiff than this. It so happens, that the last will of the testator does not refer to the execution of all powers in that behalf enabling him, which, as one of the counsel for the Defendants very properly said, was the usual form adopted by conveyancers in all well-drawn wills, in order to meet all possible questions and it has lately been decided, that the late Statute c Wills does not make a will operate (*a*) as an executio

<sup>(a)</sup> *Pomfret v. Perring*, 18 Beav. 618, and 5 De G., M. & G. 77

of a mere power of revocation. The result therefore is, that the admission of the Defendants to have the deed treated as if such a power of revocation had been inserted amounts to nothing more than this,—an admission to have a power of revocation introduced into the deed, giving effect to every species of revocation, except that which the testator has adopted.

Foreseeing this question early in the argument, after I had collected the facts of the case, I suggested to the counsel for the Defendants, whether the proper form of altering this deed, in order to make it completely revocable, and to give the settlor a complete power over the subject-matter, would not have been, to have introduced, in the first place, a general power to the settlor to dispose of the estate by deed or will, and in default of such disposition to introduce the subsequent limitations. If this had been done, it would have made the deed what Mr. *Searle* states he considered it to be, namely, no more binding on Mr. *Nanney* than a will would have been. Assuming it had been the intention of Mr. *Nanney* to make a revocable instrument, how can I now ascertain to what extent or in what manner he meant it to be revocable. Mr. *Nanney* gave his instructions to Mr. *Searle*, who read the draft over to him and made the alterations in the deed, at the time of the execution, and who considered the alterations wholly immaterial. Mr. *Searle* considered, and seems now to consider, that if the word had stood "irrevocable," it would not have been any more binding on Mr. *Nanney* than if the word had stood "revocable" in the deed, which he treated as equivalent to a will, and as being no more binding on the settlor than a will. Did Mr. *Nanney* himself treat it in any other way?

It is suggested, that the testator had much legal experience,

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perience, from his having been much engaged in litigation; but can he be supposed to have known more than Mr. *Searle*, whose profession was the law. If, when he gave his instructions, he intended that the deed should be no more binding on him than a will, and such had been his instructions, then Mr. *Searle* thought he had accomplished that object by the deed in question, and I think the settlor thought so too.

The expressions which the testator used to Mr. *Williams*, after the deed was executed, "that he had done handsomely by him," and his statement at *Chester*, "that he had provided for the two sons of Mr. *Robert Chambre Vaughan*," do not appear to me to be inconsistent with this view, for the evidence shews, that the settlor was constantly making the same observations to persons to whom he had given remote interests under his previous wills.

Nor does the subsequent conduct of the testator disagree with this view of the case. In the first place, in April, 1836, when he had a wife and two children living, he made a will giving all his property to them, and I believe he thought that the *Yspyty* estate would pass by the will.

But, besides this, there are two passages in the evidence which are, to my mind, still more conclusive that this was the view which the testator took of the case. One is the conversation which he had with Sir *Wm. Wynn*, who says, "My brother was then living at *Belmont*, in *North Wales*. I had, previous to the execution of the deed, conversations with my brother about *Yspyty* and other property, and he assured me, generally, that he had secured to me a reversionary interest in the *Yspyty* property, if he had no children." I omit one

One sentence of no moment. "These conversations were had at various times, but he positively stated that the estate was given to me for life, subject to his own life interest and if he had no children, and he stated, generally, that Mr. *Williams* should have an interest in reversion. I cannot fix a date for the first of these conversations, or any of them; I was in the habit of seeing my brother very frequently. I cannot say whether any of these conversations took place after my brother's second marriage, or whether before or after his children, or any of them, were born. I cannot positively say whether he spoke to me of the settlement of the *Yspytty* property before I met him in *London* in *November*, 1832, but he expressed that feeling generally as to all his property, and particularly as to the *Yspytty* property. The feeling which he expressed was, that I was to have an interest in it, after his death, in the way in which I have already stated." Later in his evidence he says this:—"My brother more than once told me that I was to have the *Yspytty* property if he had no children. He repeatedly said I have a great regard for you, and will do you all the good I can, but you cannot expect me to place you before my own family." I said, "God forbid I should. I believe them to be your own children; and so far from interfering between you and them, I should be glad to befriend them."

It is properly observed, that the words "your own children," fix this conversation to have occurred some time in the interval of time that elapsed between the 12th of *November*, 1835, and the 29th of *June*, 1836, the birth and death of the youngest daughter. At this time, therefore, Mr. *Nanney* thought, that Sir *Wm. Wynn's* interest in the *Yspytty* estate was subject to the interest which he had given to his children by his will of the 19th of *December*, 1835. It is the case of
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the Defendants, that the testator remembered this deed of the 6th of *November*, 1832. If he did, this conversation had no meaning, except by reference to his belief that the provisions of the deed were superseded by a will disposing of all his property. This is made still more pointed by the evidence of Mr. *Williams*, with reference to his last will, namely, that of *January*, 1838, and the fact thus established, both by parol and written evidence, and not disputed, that the testator had, in *January*, 1838, resolved (to use Mr. *Williams'* expression in his cross-examination) that Mr. *Vaughan* (that is, Mr. *Robert Chambre Vaughan*) should not get a farthing from him, and he directed Mr. *Williams* to secure this object. Two of the letters written by the testator are very pointed on this subject. One of them, dated the 13th of *November*, 1837, is thus:—"It is necessary to have a seal to my will. Do be very cautious in cutting *Vaughan* entirely out of my will for ever and effectually." He subsequently uses a violent expression against Mr. *Vaughan*, in a letter to Mr. *Williams* of the 29th of *November*, 1837.

Now, a pecuniary benefit to a man's son is undoubtedly a benefit to the father himself. Is it conceivable that after those letters, he should have intended a provision to remain which settled the *Yspyty* estate on the second son of Mr. *Robert Chambre Vaughan* for life, with remainder to his issue in tail male? If he could have revoked the limitation in the deed of the 6th of *November*, 1832, would he not have done so? I think it is impossible to doubt it. In my mind, it is equally impossible to doubt, that he believed he had done so, by taking care, that in a will disposing of the whole of his property, Mr. *Vaughan* and his issue were wholly excluded. This, therefore, strongly confirms the view I have already derived from the conduct of the testator

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after the date of the execution of the deed, from the evidence of Mr. *Searle*, and from the evidence of Sir *Wm. Wynn*.

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It was also justly observed by one of the counsel of the Defendants, that the testator was constantly, in the same letters from him to Mr. *Williams*, mentioning the *Yspytty* estate and his will, and he inferred from thence (and I am willing to admit the inference), that Mr. *Nanney* remembered the deed of *November*, 1832. But if so, I also infer, that he thought that his will would supersede the provisions of that deed.

Now I revert to the topic I before enlarged on, whether Mr. *Williams* did not also, on the preparation of the testator's will, omit to perform a duty which it was incumbent on him as the solicitor of the testator to perform.

The testator employed him to prepare his will, and he admits that he never asked him whether he intended thereby to revoke the deed of 1832. To treat that deed as irrevocable, after what had passed at the execution of it and the alteration then made, was manifestly impossible; and the Defendants' counsel have not been able so to contend. Assuming it to have been revocable, was it revocable by deed only, or by will and deed? It is impossible, on any expressed or implied intention of the testator, to support the contention that it was to be revocable by deed only. But, assuming that the deed is to be regarded (as suggested by the Defendants' counsel) as containing a power of revocation by deed or will, what was the duty of Mr. *Williams* on that occasion? Was it not his duty to ask the testator if he meant to exercise that power of revocation? If the power had been expressed in the deed, it is admitted by Mr.

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*Lloyd* to have been his duty. Was it not also his duty because it was implied? My conviction is, that if the testator had been asked that question, the deed would have been revoked, and this suit would never have been rendered necessary. This omission on the part of Mr. *Williams* is the more grave, because the testator had desired him to take care that Mr. *Vaughan* should not get a farthing from him. Was it not then the obvious duty of Mr. *Williams* to say, "Do you remember that the *Yspytt* estate is so settled, that thereby Mr. *Vaughan's* second son is probably provided for, and do you wish this to continue?" Do you wish this provision, which, if it should take effect, would be undoubtedly, though indirectly, a great benefit to Mr. *Vaughan* himself, to continue?

The result which I have come to, on this part of the case, is, that Mr. *Nanney* believed that (notwithstanding the deed of 1832) his will would operate to dispose of the *Yspytt* estate, and that Mr. *Williams* avoided doing anything or saying anything which could by possibility destroy or diminish that belief.

I think it unnecessary to refer, in detail, to the other evidence, as to the belief of the testator that his son would inherit the *Yspytt* estate. Even if the exceptions which have been taken to the evidence of one or two of the witnesses be admitted, in which however I do not express any concurrence, still it is to be observed, there are no less than seven witnesses, who all, more or less, depose to facts tending strongly to shew the belief of the testator, that after his death his only son would inherit the *Yspytt* estate, which adjoined and was intermingled with the hereditary property, which, it is admitted, he intended to leave him.

My opinion therefore is, that the testator, when he gave instructions for the deed of the 6th of *November*, 1832, intended it to be revocable by any will which he should make disposing of the whole of his property:—that he believed that the deed which he had executed did not prevent him so doing:—that he was confirmed in that belief when he executed it:—that he was confirmed in that belief when he executed his last will and his final testamentary disposition in 1838, and further, that he acted on that belief throughout the whole of that period of his life which elapsed after he had executed the deed in question.

This being my conviction, I am bound to act upon it, and to declare, that the deed of the 6th of *November*, 1832, is operative no further than he intended. The consequence is, that I cannot declare the deed to be void, because I think that the testator intended it to be operative if he made no other disposition of his property, and I should have acted upon it if he had died intestate. But I shall declare, that in the events which have happened, the deed of the 6th of *November*, 1832, was not operative after the death of the testator, and that the *Yspytty* estate passed by and was subject to the trusts of his last will and testament, which purported to dispose of the whole of his property.

Having made this declaration, the next question is, as to the consequential relief, and, in my opinion, Sir *Wm. Wynn*, in his life, and his estate since his decease, was and is bound to account for the rents and profits received by him, making all just allowances, from the testator's death. It is true that in cases of adverse possession without notice, the account would not be carried back beyond the filing of the bill, or six years; but this is the case of an infant, and Sir *Wm.*

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*Wynn* was, in my opinion, the bailiff for the infant, and is bound to account for the rents as such. He had also, by his own admission, distinct notice that the testator considered that Sir *Wm. Wynn's* interest in the property was subject to the interest of the testator's son. He knew that the deed was revocable, and, if I am right, he ought to have known that it was superseded by the will. I consider that the case is governed by the case of *Hicks v. Sallitt* (a). Assuming I am right in the conclusion I have already come to, Sir *Wm. Wynn's* legal personal representative must therefore either admit assets or submit to account. The Plaintiff must be put into possession of the estate. The suit has been occasioned by Mr. *Williams*, and he must pay the Plaintiff's costs, but I cannot give the other Defendants their costs, as I should have done if they had disclaimed: they claimed the benefit of the deed, and they must be treated accordingly.

There will be no further proceedings in the suit, except for the purpose of taking the account of the rents against Sir *Wm. Wynn's* estate from the death of the testator up to his own death, and after Sir *William's* death against Mr. *Williams*.

(a) 3 *De G., Mac. & G.* 782.

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*In re THE ELECTRIC TELEGRAPH OF  
IRELAND.*

*May 31.*

THIS Company was formed in *January*, 1852, was provisionally registered in *July*, and the deed of settlement was dated the 12th of *July*, 1852. Its object was to convey messages by electricity from *Dumfries*, in *Scotland*, to *Portpatrick*, and thence, by a submarine telegraph, to *Donaghadee*, in *Ireland*, and thence to *Belfast*, *Dublin* and other places in *Ireland*. The capital was divided into 40,000 shares of 1*l.* each.

On the 4th of *August*, 1853, an Act of Parliament passed, which incorporated the Company, and gave them various powers, and, amongst them, power to borrow 8,000*l.*, but which power had not come into operation.

The Company proceeded to effect the undertaking, and had laid down about 400 miles of wires, at an expense of 30,000*l.*; but it fell into difficulty. It appeared, from a report of the Company made in *February*, 1856, that they had laid down 196 miles of double wires; that they had expended 42,815*l.*, which, after deducting the paid capital of 26,255*l.*, left a deficiency of 16,560*l.*, and they had opened a portion of their line in *Ireland*.

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pleted for a small sum, and that there was some prospect of obtaining further pecuniary assistance. The Court considering that, under the circumstances, the Petitioner ought not to be compelled to go on with an undertaking, which might possibly double his present liability.

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On the 23rd of *April*, 1856, a circular was sent to the shareholders, which was as follows :—“ The committee, appointed at a general meeting of the shareholders of this Company to investigate its affairs, beg to call your earnest attention to the annexed balance sheet, shewing liabilities to the extent of 19,000*l.*, and for the whole of which you are individually liable, and to state, that unless you, in connexion with the other shareholders, immediately come forward to its assistance, the Company must be wound up in the Court of Chancery at a very great expense, making your position still worse, and not in any way diminishing *your present liabilities.*” It then requested the shareholders’ attendance at a meeting on the 7th of *May*, “ to devise the best means of proceeding.”

The meeting was attended by fifteen out of seventy of the shareholders, and a resolution was come to (the accuracy of the result of which was however disputed), that the Company should be wound up.

It appeared, also, that judgments had been obtained against the Company to the extent of 1,845*l.*, and that there were 13,000 shares undisposed of.

This Petition was presented by an individual shareholder, for an order to wind up the Company. It was opposed by a director representing one-eighth of the shares. He stated that the creditors of the Company were willing to reduce their debt to 12,000*l.* if the Company should be carried on, and that he believed that if the Company should be wound up, their Act of Parliament would become void, by reason of the said Company being dissolved. That the wires laid down could not be taken up from underground, and that if they could, they would only fetch the value of the materials, and

and would not realize more than 3,000*l.* But that if the Company should not be wound up, and the present works completed (which he was advised could be done and put into effective working order for 300*l.*), the property of the Company would immediately thereupon become valuable, and, in his judgment and estimation, ought then to fetch, if sold, in conjunction with the Act of Parliament, and stations and furniture, upwards of 30,000*l.*

And he said, that he had been informed, by a large shareholder of the Company, and verily believed the same to be true, that there was a great probability of two gentlemen of capital presenting themselves to the shareholders, at the general meeting in *July* next, for election to the direction of the Company, and that in the event of their being elected, would advance to or bring into the Company 12,000*l.*, which amount would be sufficient to liquidate the liabilities of the Company.

*Mr. Selwyn and Mr. Humphry, in support of the Petition.*

*Mr. R. Palmer and Mr. Greene, contrā.*

*The Master of the Rolls.*

I am of opinion, that an order must be made, in this case, to wind up the Company. The state of the case is such, that upon the admitted facts, a clear case has arisen for winding up the Company. It is not going on; it has not only spent all the subscribers' capital, but it has also incurred debts to the amount of 16,560*l.* Judgments have been recovered against the Company, and the directors themselves have sent a circular, stating, very properly, to all the shareholders, that they are individually

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individually liable for the whole of this amount, and that it is absolutely necessary that some steps should be taken for the purpose of extricating the Company from the embarrassment in which it is placed. Then one of two courses only can be taken, either the Company may be wound up, or some expedient may be adopted for the purpose of carrying it on. If the Company is to be wound up, then there are the various modes to be considered in which the property of the Company may be most beneficially dealt with. It is justly observed by Mr. R. Palmer, that, except so far as the provisions of the Act of Parliament themselves allow, the Company cannot transfer the benefit of their Act to any other Company, and that, consequently, in winding up the affairs of the Company, and in disposing of the property in the most beneficial manner, they can only accomplish that either by obtaining a fresh Act of Parliament, or so far as the powers of the present Act will allow, by enabling the property to be disposed of to other persons.

It would certainly seem to be much more profitable to dispose of the property to some company of persons, having powers under an Act of Parliament to enable them to carry it on, than to wind it up. Whether under the existing or under another Act of Parliament, if they should think fit to apply for one, which would enable the money of the Company, already expended, and the works already effected, to be made available for the purpose of a new Company, which would probably be more beneficial than selling the raw material, in the shape of copper or gutta percha, will be a matter for serious consideration in chambers, and is one which this Court would certainly view in the most favourable manner, and give every facility for carrying into effect. I cannot but think that when Parliament finds that a great portion

portion of the works is already completed, it would be more likely to pass another Act than it would if nothing has been done towards that purpose, and that it is more likely that persons will be found to advance their money for the purpose of obtaining the benefit of what has been already done, than to join a company by which, besides advancing their money, they would adopt the liabilities already existing.

The Respondent proposes not to wind up, but to carry on the Company; and he suggests, that if this Petition were allowed to stand over to the latter end of *July*, some gentlemen could be brought forward who would advance money, by means of which the shares of the Company would be taken, the powers of the Act put in operation, the existing creditors would reduce their debts, and the whole affairs of the Company placed in a more favourable position. I am disposed upon his affidavit to think, that he takes too sanguine a view, and if I were myself a shareholder, I should not think it likely to be realized, but I will assume the whole of what he states to be true, and then I have to consider this:—has this Court any power or discretion to take that course? This Court has a discretion as to the mode of winding up, it has a discretion no doubt as to refusing to wind up, but has it a discretion, when there is an existing case for winding up, to allow the matter to stand over, in order that it be ascertained whether the Company can be carried on by the advance of fresh money? I entertain very considerable doubts upon the subject, where a case is presented, in which, under the ordinary construction of the Act of Parliament, and according to the decisions which already exist, the Petitioner is entitled to an order for winding up. If it were otherwise, there might arise very serious consequences. Suppose this Court were to allow the Petition to stand

over

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over till *July*, for the purpose of seeing whether some gentlemen could be found to advance money to carry on the Company, the Petitioner, in the meanwhile, would have no means of getting out of the Company, and must still remain a shareholder, for the shares are clearly unsaleable in the market:

Again, suppose the Company were carried on for a year, and that it turned out a complete failure and the liabilities were doubled, the Court would then feel itself in a very embarrassing condition, having doubled the liabilities of the Petitioner, when, according to the existing decisions upon the construction of the Act of Parliament, he was entitled to an order for winding it up at an earlier time. Without expressing any opinion whether circumstances might not arise, which could render such a course desirable and beneficial, I need only say, that that case has certainly not arisen here, and I am of opinion that the Petitioner is entitled to the winding-up order. The matter will be before me in chambers, and I will then afford every facility for disposing of the property of the Company. Considering the view which the Respondent entertains, I think that it is possible that some gentlemen may be got to advance money and take up and carry on the concern themselves. If that be done, the affairs of the concern may be wound up with very little loss to the existing shareholders, and the Respondent and all those who concur with him may then unite with the fresh Company in furnishing a capital for carrying on the concern.

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HAYFORD v. CRIDDLE.

June 26, 27,
29.

IN 1853, the Defendant contracted to purchase a leasehold house from the Plaintiff, and in 1854, a decree was made for specific performance. In Chambers questions arose, whether, under the following circumstances, the Plaintiff could make a good title, and the matter was referred into Court.

The state of the title was as follows :—the property was demised by an indenture of the 27th *September*, 1845, to *Elizabeth Lothian* for seventy-six years, at a pepper-corn rent. The lease contained a covenant to insure, and a proviso for re-entry. *Elizabeth Lothian*, on the 1st of *October*, 1845, sub-demised it to *William Carter*, reserving a reversion of ten days of the term.

On the purchase of an underlease, it is not a valid objection to the title, that the underlease may become forfeited by the non-performance of the covenants in the original lease.

Carter, on the 3rd of *March*, 1846, mortgaged the underlease to the Plaintiff, by a sublease reserving six days, with a power of sale. The Plaintiff sold the property to the Defendant under the power, and the principal questions were, first, whether the Plaintiff had contracted to sell the underlease vested in *Carter*, or the underlease vested in himself. Secondly, whether, assuming the contract to be to sell the Plaintiff's own interest, the liabilities to forfeiture, by breaches of the covenants contained in the original lease and in the first sublease, did not invalidate the title.

Mr. *R. Palmer* and Mr. *Tennant*, for the purchaser. The Plaintiff contracted to sell a lease, but he now

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proposes to convey an underlease of an underlease. It is now clearly settled, that a contract to sell a lease is not satisfied by the conveyance of an underlease; *Madeley v. Booth* (*a*); *Darlington v. Hamilton* (*b*). The breaches of the covenants to insure, &c. by *Lothian* would cause a forfeiture of the interest purchased, and this is fatal to the validity of the title; *Doe d. Muston v. Gladwin* (*c*); *Logan v. Hall* (*d*).

Mr. *Roupell* and Mr. *Speed*, for the Plaintiff. The purchaser contracted to purchase the Plaintiff's interest, which was known to be an underlease. Secondly, the question now raised ought to have been disposed of at the hearing, and is concluded by the decree. At all events the purchaser will be safe if he performs the covenants in the original lease; *Havens v. Middle to n( )*.

The purchaser had notice of the lease of 1845, which is recited, and notice of a lease is notice of its contents; *Walter v. Maunde* (*f*); *Hall v. Smith* (*g*); and he is bound by waiver and acquiescence after he had notice.

They also cited *Burnell v. Brown* (*h*); *Fordyce v. Ford* (*i*); *Greenaway v. Hart* (*k*).

Mr. *Palmer*, in reply, referred to *Lesturgeon v. Martin* (*l*), as to waiver.

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| ( <i>a</i> ) 2 <i>De G. &amp; Sm.</i> 718. | ( <i>g</i> ) 14 <i>Ves.</i> 426.         |
| ( <i>b</i> ) <i>Kay</i> , 550.             | ( <i>h</i> ) 1 <i>Jac. &amp; W.</i> 172. |
| ( <i>c</i> ) 6 <i>Q. B.</i> 953.           | ( <i>i</i> ) 4 <i>Bro. C. C.</i> 495.    |
| ( <i>d</i> ) 4 <i>C. B.</i> 598, 613, 624. | ( <i>k</i> ) <i>C. P.</i> 31 Jan. 1854.  |
| ( <i>e</i> ) 10 <i>Hare</i> , 641.         | ( <i>l</i> ) 3 <i>Myl. &amp; K.</i> 255. |
| ( <i>f</i> ) 1 <i>Jac. &amp; W.</i> 181.   |                                          |

*The Master of the Rolls.*

The first question is, whether the Defendant contracted to buy the underlease vested in *Carter*, or the underlease from *Carter* vested in the Plaintiff, and, assuming the first question to be decided against the Defendant, the second question is, whether the liability to forfeiture arising from the breaches of the covenant contained in the original lease entered into by the original lessee to the first lessor, and those in the first sublease, does not create an incapacity to give a good title to the underlease purchased by the Defendant.

If the first question be decided in favour of the Defendant, it settles the whole question. A contract to buy a lease is not satisfied by the assignment of an underlease, and so on *toties quoties*.

The state of the title was this:—There was an original demise by *Walter* to *Elizabeth Lothian* for seventy-six years. She demised the residue, reserving ten days, to *Carter*, who sub-demises it, by way of mortgage, to the Plaintiff, reserving six days. This, therefore, was the state of the title; there were three leases, a lease to *Elizabeth Lothian*, an underlease to *Carter*, and a sublease to the Plaintiff.

The first question is this:—Was it the lease to *Carter*, or the lease to the Plaintiff, that the Defendant contracted to buy?—[*His Honor examined the evidence, and came to the conclusion that the Defendant understood and believed that he was buying the underlease to the Plaintiff, and not the underlease to Carter.*] Besides this question ought to have been raised at the hearing,

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because it is a question of contract and not of title, for the Defendant says, I contracted to buy estate *A.*, but you offer to convey estate *B.*

The next question is, whether the liability to forfeiture by *Elizabeth Lothian* and *Carter* does not prevent the Plaintiff from making a good title. This objection, if it prevailed, would prevent any sale of an underlease, unless upon special conditions, but from this I differ. The province of a special condition is, to make known to the purchaser that he will not get that which, but for the condition, he would be entitled to. A purchaser must take subject to that which is peculiar to and necessarily incident to the estate. This may be illustrated thus:—Where a contract is entered into to sell a freehold, and nothing is said about the minerals, if the purchaser finds that the minerals are reserved, the title is bad, and he cannot be compelled to take it. But if, on a sale of copyholds, nothing is said as to the minerals, can a purchaser object that the title is bad because he cannot touch the minerals except with the consent of the lord? Clearly not. So it is here, this liability is incidental to every underlease. The purchaser must have known, before the contract, that the underlease was liable to be defeated by a breach of the covenants contained in the original lease.

It is for this reason, and because of this very evil, that a contract to assign a lease is not satisfied by granting or assigning an underlease. If this were otherwise, the only difference between a contract for an underlease and an original lease would be a question of title, but it is a question of contract. The Court says you offer to convey a different thing from that which you contracted to sell.

Here

Here the purchaser knew of this objection when he contracted to purchase.

I am, therefore, of opinion, that this objection cannot prevail, and that the Chief Clerk has come to a right conclusion on both points.

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Jan. 8.

IT was referred to Chambers to inquire as to what children there were of *Matilda P.*

It appeared that she had married *Lee H.* on the 14th of *October*, 1844, and had a child on the 6th of *January*, 1845, about three months after the marriage. *Lee H.* left his wife, and died in the *Morea* in *May*, 1846. It was suggested that she had never seen *Lee H.* until immediately before her marriage, that he was then already married, and that, therefore, the child was not his.

In to another person. In the

cross-examination of the mother, it was proposed to ask her,—“How long she had known her husband before her marriage.” This question was objected to, but the Court allowed her to be asked,—“When did you first become acquainted with your husband?” and she having answered twelve months before her marriage, the Court would not permit this subject to be further pursued.

DATES.

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| 1843. Aug. or Sept. | <i>Matilda A.</i> first met <i>Lee H.</i> |
| 1844. Oct. 14. | She married <i>Lee H.</i> |
| 1845. Jan. 6. | Child born. |
| 1846. May. | <i>Lee H.</i> died. |

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ANON.

In cross-examining *Matilda P.*, on her affidavit made in support of her child's claim, it was proposed to ask her, how long she had known *Lee H.* before her marriage with him. This question was objected to, on the ground that its object was to bastardize the issue, by shewing that the child could not possibly be *Lee H.*'s.

*Mr. Shapter* and *Mr. Ballantine*. There is no presumption of law that the child was the issue of *Lee H.*, unless it be shewn that he was either a bachelor or widower during such a period before the marriage that he might, whilst unmarried, have begotten the child.

The presumption that a child, begotten before, but born after the marriage of a woman, is the issue of the husband, arises only when the man or woman were, at the time of conception, capable of contracting marriage; *Butler's Co. Lit.* (a); *Doe d. Birtwhistle v. Vardill* (b).

The rule of evidence is limited to this:—that a married couple shall not be admitted to prove that they have had no connexion after marriage, and that the issue born in due time after marriage is spurious; *Goodright v. Moss* (c).

If there could be no access by a husband, or a person capable of being a husband, the wife can prove paternity; *The King v. The Inhabitants of Sowton* (d); *The King v. The Inhabitants of Kea* (e); *The King v. Luffe* (f); *Sparrow v. Harrison* (g); *Legge v. Edmonds* (h).

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| (a) Pages 244 b, n. 2; 245 a,<br>n. 1.<br>(b) 5 <i>Barn. &amp; Cr.</i> 439, n. (a);<br>2 <i>C. &amp; Fin.</i> 571.<br>(c) <i>Couper</i> , 591. | (d) 3 <i>Ad. &amp; El.</i> 180.<br>(e) 11 <i>East</i> , 132.<br>(f) 8 <i>East</i> , 193.<br>(g) 3 <i>Curt.</i> 16.<br>(h) 25 <i>Law J., N.S. (Ch.)</i> 125. |
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The wife having filed an affidavit, and given her evidence, is a competent witness for all purposes. She cannot give partial evidence; *Hawkesworth v. Showler* (*a*).

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*Mr. Hawkins* and *Mr. Stiffe*, in support of the objection, cited 1 *Roll. Abr.* (*b*); *Reg. v. Garbett* (*c*); *Att.-Gen. v. Briant* (*d*); *The Queen v. Collingwood* (*e*); *Rex v. Gilham* (*f*).

*The Master of the Rolls* allowed the question to be put, "when did you first become acquainted with *Lee H.?*" and the witness having answered in *August* or *September*, 1843, he would not allow the subject to be further pursued.

(*a*) 12 *Mee. & Wels.* 45.(*d*) 15 *Mee. & W.* 169.(*b*) *Tit. Bastard, letter B.*,(*e*) 12 *Q. B. Rep.* 681.

p. 358.

(*f*) 1 *Mood. Cr. C.* 186.(*c*) 2 *Car. & K.* 474.WOODBURN *v.* GRANT.

July 3.

BY an indenture, dated the 26th day of *November*, 1844, and made between *Theodore Williams* of the one part, and Messrs. *Woodburn* of the other part, after reciting the will of a testator, whereby he bequeathed three life annuities of 16*l.*, 6*l.* and 20*l.* to three annuitants, and the residue of his personal and mixed estate to *Theodore Williams*, and that he had appointed *Grant* and *Colville* executors of his will,

*A.* mortgaged to *B.* his reversionary interest in a sum of 3,681*l.* stock, which the deed represented as standing in the name of two executors of a testator to secure three annuities. *A.* gave notice to the executors, but there was no such sum standing in the name of the executors, but there was one sum of 2,080*l.* standing in the name of the testator, and a second sum of 2,451*l.* in the name of one of the executors, to answer the annuities. A subsequent incumbrancer on the whole fund also gave notice to the executor. Held, that *A.*'s security was limited to 3,681*l.* stock.

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which had been proved by *Grant* alone in *Jamaica*, and that for the purpose of answering the three annuities, "a sum of 3,681*l.* 2*s.* 4*d.* £3 per Cent. Reduced Bank Annuities had been invested, and was then standing in the names of" *Grant* and *Colville* in the bank books, it was witnessed, that *Theodore Williams* assigned to Messrs. *Woodburn*, "all that the remainder or reversion of him the said *Theodore Williams* expectant upon the decease of the" three annuitants, "of and in all that the said sum of 3,681*l.* 2*s.* 4*d.* £3 per Cent. Reduced Bank Annuities so invested as aforesaid, and the dividends," subject, nevertheless, to redemption on payment in 1847 of 2,000*l.* and interest.

On the 7th of *December*, 1844, notice of this assignment was served on the executors of the will of the testator.

Notwithstanding the statement contained in the mortgage, it afterwards appeared, that no such sum as 3,681*l.* 2*s.* 4*d.* £3 per Cent. Reduced Annuities had ever been standing in the names of *Grant* and *Colville*, but that there were standing in the bank books two sums, one of 2,080*l.* 11*s.* 11*d.* Reduced £3 per Cent. Annuities in the name of the testator, and the other of 2,451*l.* 16*s.* 3*d.* like annuities in the name of *Grant* alone, the whole of the dividends of which two sums of stock were required for, and applied in the payment of the three annuities. Afterwards *Theodore Williams* charged his reversionary interest in the last-mentioned Bank Annuities, by way of security, to *Porter* and *Watts*, who gave notice in 1852. There were other subsequent charges upon these Bank Annuities.

Two of the annuitants had died.

The bill was filed by the representative of Messrs. *Woodburn*,

Woodburn, for an account of the principal and interest due under the deed of *November*, 1844, and praying that, after providing for the surviving annuity, the proceeds of the two sums of stock might be applied in paying the Plaintiff the amount of his principal and interest.

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A motion for decree was now made.

Mr. *Cairns*, Mr. *Toller*, and Mr. *Wiglesworth*, for the Plaintiff, argued that upon the principle of *falsa demonstratio non nocet*, the misdescription of the stock in the Plaintiff's security was unimportant; *Llewellyn v. Earl Jersey* (a); as there was a manifest intention to assign the reversionary interest in the whole fund set apart to satisfy the annuities. That the assignment having been followed by notice to the trustee, the Plaintiff was entitled to have his mortgage upon it satisfied out of that portion of the fund which was now divisible, in consequence of the deaths of the two annuitants, in priority to the claim of *Watts* and *Porter*, the second mortgagees.

Mr. *R. Palmer* and Mr. *Grenside*, for the second mortgagees, contended, first, that it was not a mere case of misdescription, but that, upon the terms of the instrument, the sums which were then, and at the date of the Plaintiff's mortgage, subject to the trusts of the will, did not pass. That the notice could not carry the right of the Plaintiff further than the expressed terms of their security. That in order to give effect to that security, as against the second mortgagees, it would first be necessary to reform the Plaintiff's security, which seemed to have been based upon the loose assertions of the mortgagor, the truth of which they had not taken the trouble to ascertain, or to inquire of the executors

(a) 11 *Mee. & W.* 183.

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cutors the exact amount of the stock; that the frame of the bill should have been framed accordingly. That the second mortgagees had a natural equity, which, in a case of this description, entitled them to require, that a strict and technical construction should be put upon the Plaintiff's security, and that, as the security of the second mortgagees embraced the residuary estate (which in point of fact was the real character and correct description of the funds in question, both now and at the date of the several securities), they were entitled to priority over the Plaintiff.

Secondly, they contended, that, even conceding that the Plaintiff's security was entitled to priority, he was not entitled to an absolute priority over the *whole* fund, but only to the extent of the amount of stock designated in his security, viz., 3,681*l.* 2*s.* 4*d.* Reduced Annuities, on the principle "*Expressio unius est exclusio alterius,*" and that the residue of the present trust fund belonged to the Defendants, the second mortgagees. That, inasmuch as a portion of the fund would still be required to satisfy the existing annuity, and as that was a common burden, the fund ought to be rateably apportioned between the Plaintiffs and the Defendants, the second mortgagees.

Mr. J. T. Wood, for the executor *Grant*.

Mr. Nichols, for the surviving annuitant.

Mr. Osborne, for the official assignee of *Theodore Williams*, the insolvent.

Mr. Cairns, in reply.

The Master of the Rolls.

The description in the deed is perfectly clear; it recites

recites the bequest of three annuities, and that a sum of 3,681*l.* 2*s.* 4*d.* £3 per Cent. Reduced Annuities is standing in the names of the executors to answer them. In point of fact, there is no such sum standing in their names, but there are two sums, one standing in the name of the testator, and the other in the name of *Grant*, and though it is not said that they were expressly set apart for that purpose, still they were standing to answer the annuities. There was, therefore, more than the sum of 3,681*l.* 2*s.* 4*d.* to answer the annuities, and I think that to the extent of 3,681*l.* 2*s.* 4*d.* Reduced Annuities only the Plaintiff is entitled.

There will, therefore, be a declaration that, subject to the annuity which is still subsisting, the Plaintiff is entitled to a charge, as first incumbrancer, on the whole stock, to the extent of 3,681*l.* 2*s.* 4*d.* Reduced Annuities, and that the Defendants, the second mortgagees, are first incumbrancers on the residue of the fund. A proper amount of stock must be retained for answering the annuity which is still subsisting, which must be provided rateably by the two funds.

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The Plaintiff proved the deed of 1844, as an exhibit at the hearing. An objection was taken that this could not be done on motion for decree, but

The Master of the Rolls overruled the objection.

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HOPWOOD *v.* HOPWOOD.*July 23, 24.*

In 1829, a testator directed his trustees to raise 5,000*l.*, out of his real estate, for his son. In 1835, on his son's marriage, he covenanted to pay, at his death, 5,000*l.* to the trustees of his son's settlement. In 1850, after referring to the legacy of 5,000*l.* to his son, he directed his trustees to raise a further sum of 7,000*l.* for his son. Held, by the Master by the Rolls and the Lords Justices, that the first bequest had not been adeemed, and that the three sums of 5,000*l.*, 5,000*l.* and 7,000*l.* were payable.

IN 1829, the testator, by his will, devised his real estate to trustees for 1,000 years, upon trust to raise the sum of 5,000*l.* a piece for his two sons, *Frank* and *Hervey*, and for his daughter *Mary*, payable with interest as therein mentioned.

In 1834, he made a codicil, whereby he revoked 5,000*l.* to his daughter *Mary* as her portion, and having on her marriage paid into the hands of Lord *Molyneux* 2,000*l.*, in part of the said portion, he thereby bequeathed the further sum of 3,000*l.* to his daughter *Mary*, to complete his original intention.

In 1835, in contemplation of the marriage of his son *Frank*, the testator covenanted with the trustees of his son's marriage settlement to pay them, within twelve months after his decease, the sum of 5,000*l.*, to be held upon trust for his son *Frank*, his wife and their children.

In 1850, the testator made a second codicil, whereby, after reciting that he had by his will devised certain estates to trustees, upon trust to raise two sums of 5,000*l.* each for the benefit of his two sons *Frank* and *Hervey*, he thereby directed his trustees to raise two *further* sums of 7,000*l.* each, one of which two sums of 7,000*l.* each should be held by them upon the same trusts, and be applied in the same manner, for the benefit of his son *Hervey Hopwood*, absolutely, as in and by his will declared concerning his legacy of 5,000*l.*, and one other of which two sums of 7,000*l.* each should be held by them

them upon the trusts, and be applied in the same manner, for the benefit of his son *Frank Hopwood*, as in and by his will declared of and concerning his said legacy or sum of 5,000*l.* thereby given and bequeathed for his benefit. And, lastly, he thereby ratified and confirmed his will and the first codicil thereto, in all respects, save and except so far as the same will and codicil were thereby altered.

In 1851, the testator made a third codicil, and thereby, after reciting that he had, since the date and execution of the second codicil, raised 5,000*l.*, with which he had purchased for his son *Hervey Hopwood* a lieutenant colonelcy in the Guards, and which sum might remain a charge on his property at his death, he declared it to be his wish and intention that the 5,000*l.*, so invested in such purchase, should be accepted by his said son in satisfaction of the legacy of 5,000*l.*, which the testator had, by his will, directed to be raised for and paid to his son *Hervey*, and he therefore thereby revoked and cancelled the legacy of that amount by his will directed to be paid to him, and in all other respects he ratified and confirmed his will and his two former codicils thereto.

The testator died in 1854, and this suit was instituted for the purpose of obtaining the declaration of the Court that the legacy of 5,000*l.* given by the will to *Frank Hopwood* had been satisfied by the sum of 5,000*l.*, which the testator, by the settlement executed in contemplation of the marriage of his son *Frank*, covenanted to pay.

The Plaintiff (who was the eldest son and entitled to the testator's real estates) insisted that the legacy of 5,000*l.* by the will given to *Frank Hopwood* was satisfied and deemed by the covenant, and that he was only

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only entitled to receive the sum of 7,000*l.* given by the second codicil to the testator's will. By his bill he prayed a declaration accordingly, and for the necessary consequential directions.

The *Solicitor-General* (*Sir R. Bethell*), Mr. *Roupell* and Mr. *Karslake*, for the Plaintiff. The 5,000*l.* covenanted to be paid by the testator to the trustees of the settlement is identical with the 5,000*l.* given by the will. Had the sum put in settlement been actually paid at the time, it would have made a considerable difference, for then the legacy of the 5,000*l.* would have been distinct and separate. The legacy therefore remained a mode of satisfaction of the covenant. The inference is irresistible of what the intention of the testator was; it is manifest that he meant both the younger sons to be benefited in equal proportions. The testator speaks of his son's portion as 12,000*l.*, and the codicil of 1850 does not in terms say "I give a new legacy of 5,000*l.* besides that given by the will." At the date of the second codicil there was only one existing gift to the son of 5,000*l.*, either under the bequest or by virtue of the covenant to pay that sum. The expression "two further sums of 7,000*l.* each," in the second codicil, must be read as "further portions." They cited *Izard v. Hurst* (a); *Drinkwater v. Falconer* (b); *Crosbie v. Macdoual* (c); *Monck v. Lord Monck* (d); *Powys v. Mansfield* (e); *Weall v. Rice* (f); *Booker v. Allen* (g); *Lloyd v. Harvey* (h); *Upton v. Prince* (i); *Pym v. Lockyer* (k); *Suisse v. Lowther* (l); *Montague v. Montague* (m). The rule of the Court is, that double portions

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| (a) <i>Freem. C. C.</i> 224.                                         | (g) 2 <i>Russ. &amp; M.</i> 270.   |
| (b) 2 <i>Ves. sen.</i> 623.                                          | (h) <i>Ibid.</i> 310—316.          |
| (c) 4 <i>Ves.</i> 610.                                               | (i) <i>Cus. temp. Talbot</i> , 71. |
| (d) 1 <i>Ball &amp; Beat.</i> 298.                                   | (k) 5 <i>Myl. &amp; Cr.</i> 29.    |
| (e) 6 <i>Sim.</i> 528; S.C., on appeal, 3 <i>Myl. &amp; Cr.</i> 359. | (l) 2 <i>Hare</i> , 424.           |
| (f) 2 <i>Russ. &amp; M.</i> 251.                                     | (m) 15 <i>Beav.</i> 565.           |

tions are not to be favoured; *Earl of Durham v. Wharton* (*a*).

At the conclusion of the argument for the Plaintiff, *The Master of the Rolls* said that he would read the will and codicils, and, if necessary, hear

*Mr. Roundell Palmer* and *Mr. Little*, for the Defendant.

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*The Master of the Rolls.*

*July 24.*

The further consideration I have had of the case has confirmed me in the opinion I formed upon the argument yesterday. I feel less difficulty about the case, because I am satisfied that nothing was left unsaid that could reasonably have been urged in support of the Plaintiff's case.

The facts are shortly these:—The testator, on the 29th of April, 1829, gave a legacy of 5,000*l.* to his son *Frank*, and by that will he shewed a disposition to make his younger children equal by giving them 5,000*l.* each. One of them, his daughter, married the Earl of *Sefton*, and upon that marriage 2,000*l.* was paid. Thereupon he made a codicil in July, 1834, in which he stated what had been done, and that only 3,000*l.* remained to make good the amount of her legacy, and that what he had advanced was to be an ademption *pro tanto*. In May, 1835, his son *Frank* married Lady *Eleanor Stanley*, and upon that occasion, the father entered into a covenant to pay 5,000*l.* upon the trusts of the settlement, to be paid upon his death, but with interest in

(*a*) 10 *Bligh. N. S.* 526; *S. C.*, 3 *C. & Fin.* 146.

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in the meantime. He subsequently made a codicil in *February*, 1850, to which I shall presently more particularly refer. He afterwards made a third codicil. It is to be observed, that the second codicil shews a disposition that the two sons should share equally. By the third codicil, in *April*, 1851, he recites that he had advanced 5,000*l.* for the purpose of promotion in the army of his son *Hervey*, and accordingly he says, in substance, that it is to be an ademption of the legacy of 5,000*l.* given him by the will. The testator then died, nothing further having taken place.

The question is, whether the legacy of 5,000*l.* is adeemed by this covenant to pay the 5,000*l.* upon the marriage. If the matter had rested there, and there were nothing more in the second codicil than I have already stated, I should have been of opinion that the presumption against double portions would prevail, and that it would be impossible to say that that legacy of 5,000*l.* was not adeemed by the covenant to pay the 5,000*l.*

But the second codicil was made in 1850, subsequent to the marriage of his son *Frank* in the year 1835, and the material part of it is in these words:—[*The Master of the Rolls here read the words of the second codicil.*]

The question is, whether the legacy given by the will, and adeemed, as it is said, by the covenant in the settlement, is restored by this codicil. Cases are cited, such as *Powys v. Mansfield* (*a*), and others, to shew that a general reference to a will, in which a legacy is given, but which has been adeemed, is merely referring to it as if the adeemed legacy formed no part of it; and generally

(*a*) 3 *Myl. & Cr.* 359.

generally I admit that to be true. So, also, if a legacy given by a will is afterwards revoked by a codicil, it is not revived, either by a republication of the original will, or by a reference to it, or by a direction confirming the will generally. But here, the codicil does more than refer to the will generally; it refers to the particular legacy, and treats it as an existing legacy, and then gives something in addition to it. Now this is either admitted, or must be admitted, to be so in the case of the son *Hervey*; and why is it not so in the case of the son *Frank*?

It has been very justly observed by the Solicitor-General, in opening the case, and admitted by him, that an ademption is not a consequence of law, necessarily following from a particular act, but that it is a question of intention, and therefore the object is, to ascertain the intention of the party. The consequence is, that there is a fallacy in the reasoning, when it is said, "when you refer to the original will, you refer to a will which excludes this particular legacy;" and this it is which make the distinction between these cases of ademption and those where the gift fails by the absence of the chattel or specific legacy, to which Mr. *Karslake* referred. In the latter case, the gift fails not so much by a consequence of law, as by a consequence of fact; the thing is actually gone; it cannot be given, because it does not exist. If, in fact or in consequence of a principle of law, the thing bequeathed must be treated as gone, why then a reference to the will would not set it up again. But the question here is, did the testator, when he covenanted, on the marriage of his son, to pay 5,000*l.* by that act intend to adeem and take away the legacy given in the will? *Prima facie* he did. If that act stands alone, the presumption of law is that he did. But that is a presumption to be rebutted; it is a pre-

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sumption to be repelled by evidence, which may be given for that purpose. The best possible evidence is, the evidence of the testator's own expressions. What does he do? He says, "I have given my son by my will 5,000*l.*; now I give him a further sum of 7,000*l.*; and I desire that the trusts of the 7,000*l.* shall be exactly the same as the trusts corresponding with his legacy of 5,000*l.*" Is it consistent with that to suppose, that he did not believe that the legacy was existing at that time? It is obvious that he did in the case of the son *Hervey*. Why did he not do so in the case of his son *Frank*? If the legacies had been of exactly the same amount, those words would have been necessary to shew that he did not mean repetition, but that he meant addition, and not substitution; and these words would have been clear to indicate that intent.

Supposing there had been a prior codicil which revoked the legacy of 5,000*l.*, would not this subsequent codicil have restored it, and shew that he did not intend that the prior codicil should have the effect of revoking it? But this is much stronger, because the codicil would have shewn a clear intention to revoke; but the covenant to pay 5,000*l.* indicates only a presumed intention to revoke. It is a presumption which the law arrives at, on the ground of objection to double legacies. Supposing there was a reference in the will to a settlement, and that he had then simply said that he confirmed his will generally, that, probably, would have been sufficient. But the strong circumstance, in this case, is, that the express words of the codicil speak of this as a positive and existing legacy, in addition to which another is given.

It is said, that he forgot the settlement at the time. I cannot presume that; on the contrary, I must assume that

that he remembered the settlement, and all the circumstances which it was material for him to know at the time he made his will. It was his duty to remember it; and it is considered a mark of imperfection in a testator's mind (as was urged before me in a late case which I had for a new trial), if a testator does not take into consideration, at the time he is making his will, all the claims of all persons upon him. I mention this merely for the purpose of shewing, that they usually are present to the mind of a testator, and are assumed, by the law, to be so; and that there must be proof that they were not so, if anything is to be founded upon it. It is obvious that the testator had this species of knowledge in the case of the other children, and there is evidence also that he did know of the settlement; for he was paying interest on the 5,000*l.*, as appears from a reference to his accounts.

It is assumed that the first and third codicils are to be referred to for the purpose of shewing his intention to make them all equal; but, to my mind, they have an operation rather in a contrary direction: they shew that he recollects that he had advanced this money to the daughter, and that he had advanced money to the other son. Why is it to be assumed that he did not recollect what he had done with respect to the third? As regards the two, he intended there should be ademption; and accordingly he expressed his intention. In the other case, he did not intend there should be ademption, and accordingly he did not say so;—but, on the contrary, he makes a codicil expressly stating that there is an existing legacy, and he gives another in addition.

The result is, that, in my opinion, the son *Frank* is entitled to both the legacies and to the benefit of the covenant. Take a declaration that the legacy of 5,000*l.*

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was not adeemed by the covenant, but that the Defendant, the Rev. *Frank George Hopwood*, is entitled to both the legacies, and to the benefit of the covenant. Direct the costs of all parties to be paid out of the estate.

*Note.*—Affirmed by the Lords Justices, 17 Feb. 1857.

#### HANCHETT v. BRISCOE.

*July 22.*

*A. B., a married woman, who was absolutely entitled to stock in Court, being separately examined, desired it to be transferred into the names of trustees, "upon trust for her absolutely, and that the dividends should be held and applied for her separate use for her life." This was accordingly done. Held, that, during coverture, she could dispose of her life interest, held for her separate use, but not of her reversionary interest, and the trustee having, at her request, advanced the fund to her husband,*

*whereby it was lost, was held liable to replace it, but her life interest was made answerable for the trustee's indemnity.*

BY a decree of this Court, made on the 23rd of February, 1838, in a cause of *Phelps v. Barnard*, in which the Plaintiff and her then husband *Robert Austen Langworthy* were Defendants, it was declared, that the Plaintiff (then Mrs. *Langworthy*) was absolutely entitled to one-fifth part of certain *South Sea* and *East India* Stock, then standing in the names of two of the Defendants in that cause as trustees; but that the dividends thereof were to be held and applied for her separate use for her life. And it was also ordered, that such one-fifth should be carried to an account, "The Account of the Defendant *Elizabeth Langworthy*," and the dividends thereof, from time to time, paid to her for her separate use during her life, or until further order.

A Petition was subsequently presented in the cause by *Robert Austen Langworthy* and the Plaintiff (his then wife) and *Felix Parkinson* and *William Briscoe*, which, after reciting an order of the 10th August, 1838, for the attendance of the Plaintiff before certain commissioners, who were to examine her to whom, and in what manner, and for what purpose, she was willing and desirous that the sums of 1,616*l. 3s. 2d.* Bank £

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per Cent. Annuities, 2,087*l.* 9*s.* 10*d.* Bank Stock, 200*l.* *East India Stock*, and 195*l.* *South Sea Stock*, standing to the "Account of the said *Elizabeth Langworthy*" should be transferred and disposed of; and that on her examination, she had declared her will to be, that the said several sums of stock should be transferred into the name of *F. Parkinson* and *W. Briscoe*, upon trust for her the said *Elizabeth Langworthy* absolutely; and that the dividends should be held and applied for her separate use for her life, and, after stating the certificate of the commissioners to that effect, prayed for the transfer accordingly.

By an order made on the Petition on the 24th *December*, 1841, it was ordered, that this transfer should be made upon trust for the said *Elizabeth Langworthy*, pursuant to the examination in the Petition mentioned.

These sums of stocks were shortly afterwards transferred to *F. Parkinson* and *William Briscoe*, the trustees.

*F. Parkinson* did not actively interfere in the management of the trust, but *W. Briscoe* (who was alleged to be the solicitor and confidential professional adviser of the Plaintiff's late husband, *R. A. Langworthy*) took upon himself the management of the trust funds.

The trust funds, or the greater part of them, were sold out by the trustees and advanced to *Robert Austen Langworthy* upon the security of some property. This had been done at the written request of the husband and of the Plaintiff, his wife, whereby she expressly authorized the trustees to do so, on the husband giving an equitable mortgage of the premises therein mentioned; and the Plaintiff declared as follows:—"And I,  
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the said *Elizabeth Langworthy*, do hereby expressly declare, that the said *Felix Parkinson* and *William Briscoe* shall not be required to make good any loss or losses that may arise to the said trust funds, so transferred into their names as aforesaid, by reason of such present sale and appropriation, or of such sales and appropriations, as aforesaid, having been made, by reason of the said mortgage proving insufficient to realize the said sum of 2,275*l.* now to be advanced to him, and the several sums so advanced to him the said *Robert Austen Langworthy* as aforesaid."

Mr. *Langworthy* died in 1850, and in 1853 his widow, the Plaintiff, married Mr. *Hanchett*. Of the two trustees, *Parkinson* died in 1849 and *Briscoe* in January, 1855.

The Plaintiff, though she assented to the advances to her husband, now alleged that she had done so upon the understanding that the greater portion of the same would be properly secured on property belonging to her late husband, and particularly of his interest in a house at *Bath* and elsewhere. It appeared, that, after the death of *R. A. Langworthy*, the Plaintiff, or her present husband in her right, had received the rents of this house until the 24th *June*, 1855.

This property had, however, been claimed by the assignee of Mr. *Langworthy*, who had taken the benefit of the Insolvent Act in 1834, and it had been sold to pay prior incumbrances thereon.

The Plaintiff, by this bill, insisted, that *Briscoe* had committed a breach of trust by selling out the trust funds and advancing the same to her late husband, and prayed that they might be replaced out of his estate.

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Mr. *Rouppell* and Mr. *Stiffe*, for the Plaintiff. The property was vested in the trustees, in trust for Mrs. *Langworthy*, for her separate use for life, with an absolute unqualified interest to her in reversion. She had, therefore, no power, either by an examination in Court (*a*) or by any act or disposition out of Court, to deprive herself of her reversionary interest in the property, which was a mere *chuse in action*. The two interests are distinct, and will not be considered as united for the purpose of depriving her of the protection intended for her; *Whittle v. Henning* (*b*). In *Crosby v. Church* (*c*), there was a bequest of consols to *A. B.*, a *feme covert*, to be transferred to her in her own name, and the interest to be for her separate use, and the principal to remain in the trust of the executors till the youngest of her children should attain twenty-one, when the principal was to be her own; or in case of her demise it was to devolve to her husband. The trustees, on the death of the testatrix, transferred the fund to *A. B.*; she and her husband afterwards sold it out, and they both signed the transfer: it was held, that a breach of trust had been committed.

Here the trustees were guilty of a breach of trust in paying over the trust fund to the first husband, even with the Plaintiff's consent, for being under coverture, she had no power of disposition over her reversionary interest. The wife's acquiescence did not exonerate the trustees from the breach of trust or the consequences of it, and they and not her estate are liable to make good the loss; *Kellaway v. Johnson* (*d*); *Stretton v. Ashmall* (*e*).

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| ( <i>a</i> ) <i>Richards v. Chambers</i> , 10<br><i>Ves. 580.</i> | ( <i>c</i> ) 3 <i>Beav.</i> 485.  |
| ( <i>b</i> ) 11 <i>Beav.</i> 222, and 2 <i>Philips</i> , 731.     | ( <i>d</i> ) 5 <i>Beav.</i> 319.  |
|                                                                   | ( <i>e</i> ) 3 <i>Drewry</i> , 9. |



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The object of the declaration of the Court was to protect the wife against the influence of the husband, and no assent of hers, as a married woman, could authorize the trustees to commit a breach of trust. No consideration passed to the wife in the transaction, and her exact position was not, as it should have been, explained to her by the trustee *Briscoe*, who was also her solicitor; nor had she communicated to her a full knowledge of all the circumstances. The contract was not therefore binding upon her; and the securities having turned out insufficient, *Briscoe*, as solicitor, is personally responsible for the deficiency; *Craig v. Watson* (a). -

*The Master of the Rolls* held, that the Plaintiff had parted with her life interest, which, assuming that the *corpus* of the fund would have to be replaced, must go to recoup the trustees in respect of their losses. He required Counsel for the Defendants to address themselves only to the point as to the right of the Plaintiff, during coverture, to deal with the reversionary interest in the fund.

*Mr. R. Palmer* and *Mr. Renshaw, contra.* It is an entirely erroneous view to divide the Plaintiff's interest into a life interest and a reversion. The fund was transferred to the trustees "upon trust for *Elizabeth Langworthy absolutely*," with a superadded separate use clause attached to her life interest only, which merely gave her a power of disposition over the rents, independent of her husband, during the coverture. It is clear, that under the orders of the Court, she had an absolute dominion over the fund, either for her separate use or without that clause, and a disposition made by both husband and wife became perfectly effectual. The case is not like

(a) 8 *Beav.* 427.

like *Richards v. Chambers* (*a*), where the object of the settlement was to exclude the marital right, and to protect the wife against the marital influence; here her express intention was that she was to have the property "absolutely," and for that purpose, the money was paid out of Court and placed in the hands of the trustees. Nor does the case come within the principle of *Whittle v. Henning*, where the avowed object was, by getting in and merging another interest, to defeat the protection afforded the wife. Here the whole absolute interest was from the beginning in the wife, and there was no intention to divide it into portions and keep them severed.

The wife concurred in every act complained of, and her interest is bound by that concurrence; *Pawlet v. Delaval* (*b*); *Brewer v. Swirles* (*c*). The Plaintiff was discovered from May, 1850, to May, 1853, and made no complaint of the advances made, with her own assent, to her late husband; and not only so, but she also received the rent of one of the houses upon which the money was advanced, and continued to receive it, after her second marriage, down to June, 1855. This is a complete acquiescence, and when she survived her husband, she could then deal with the property as she chose; and this is her second husband's suit. The orders were made by this Court, which declared her right, and the trustee was bound to act under them. In *Lynn v. Ashton* (*d*), a *feme covert*, having an interest for life to her separate use, and a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, and appointed the fund after her death, to trustees, upon trust to invest the fund in the immediate purchase

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(*a*) 10 *Ves.* 580.  
(*b*) 2 *Ves. sen.* 663.

(*c*) 2 *Smale & Gif.* 219.  
(*d*) 1 *Russ. & Myl.* 188.

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purchase of an annuity for her life. The Court ordered a transfer of the fund to the new trustees accordingly.

Prior to the case of *Whittle v. Henning* in 1848, the Courts decided exactly the reverse, as in *Hall v. Hugo-nin* (*a*) ; *Bishopp v. Colebrook* (*b*). It would be harsh in the extreme to make trustees liable for an error in law, whilst acting in conformity with the existing decisions of the Judges. *Sturgis v. Corp* (*c*) was also referred to.

The MASTER of the ROLLS.

In this case I am of opinion, that this married woman has disposed of everything she could dispose of, namely, her life interest, but with respect to her reversionary interest, subject to her life interest, I am of opinion she had no power to do so.

The first question is, had she the power to dispose of it. The second question is, whether the trustees, under the circumstances of the case, and under the orders of the Court, were not justified in adopting the course they have taken. The first is the more important question, and that question resolves itself into this, whether, where a fund is transferred into the names of two trustees, in trust for the separate use of a married woman for life, and subject to that, to her absolutely, she has power to dispose of the whole of the fund. I am of opinion, that she has not. No doubt "separate use" is entirely a creature of equity, but you must regard the mode in which these estates are created, and the different qualities that belong to them, although in many cases a person may have the power of dis-

posing of the whole fund. That is true both in respect of personal property, as well as in respect of real estate.

In one case relating to powers, Sir *Wm. Grant* pointed out a very important distinction that exists between an estate given to trustees in trust for *A.*, and his heirs for ever, in which he takes a mere fee simple estate; and an estate given to *A.*, for life, and subject thereto to such uses as he by deed or will may appoint, and in default of appointment, to him and his heirs for ever. In either case it is quite clear, that he has the absolute power of disposing of the whole of the estate, but they are different estates, and different qualities attach to them. What is it that this lady had? Here is a fund given to trustees in trust for her separate use. With respect to that she is a *feme sole*; she has the power of disposing of it. Subject to that, it was given to her absolutely. She had then the simple reversion in the estate. There is no question but that, if that reversion had been given to her for her separate use, she could have disposed of that reversion. *Sturgis v. Corp*, and several other cases, determine that she could then dispose of the life estate and the reversion, because she is made a *feme sole* in respect of both, and has, as such, the power of disposing of both; and although they do not coalesce, to use the expression and observation of the Vice-Chancellor of *England* in the case referred to, she had the absolute power of disposal over the whole of the fund. Expand the estate, and see what the powers of it were. It is a gift to trustees for her separate use for life, that is, to such uses as she shall by any direction whatsoever appoint during coverture, and subject to that it is given to her, to such directions, and to such persons, and for such interests as she shall by deed or will, or any instrument in writing, direct or appoint when she is

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is *discovert*, and subject thereto to her representatives. That is the nature of the estate: she has the power of disposition over the one *during coverture*, and she has no power of disposition over the other until she is *discovert*, when she acquires the power of disposing over the other. By what possibility can the fact of these two estates, or rather these two interests, being united in the same person, give her an interest over the reversion which, taken by itself, she does not possess. No case was cited to me to remove this difficulty. Cases are cited which, in my opinion, go much further, as *Whittle v. Henning*, before Lord *Cottenham*, where the interests were of the same quality, but the one had been transferred to the other for the purpose of making them coalesce, Lord *Cottenham* said, he would not allow her to dispose of the property. But here they are of different qualities; the estate for life is for the separate use, but the reversion is not for the separate use: it is to her absolutely, that is to say, it is only liable to be disposed of by some instrument when she is *discovert*.

The case of *Lynn v. Ashton* (a), and other cases cited, agree with the case in *Smale and Giffard*. These were cases of powers of appointment, which could be executed during the coverture; and the only question was, whether the lady had executed the power during coverture. They are distinct from this case, where she had no power of appointment over the fund during that time. No doubt if she had done the act during her *discoverture*, she would have been bound.

It was suggested that during the three years that elapsed from the death of the first husband to the marriage with the second, she must be considered to have acquiesced, and *Pawlet v. Delaval* and some other cases

(a) 1 *Russ. & Myl.* 188.

cases were cited for that purpose. These are important cases, which the Courts are in the habit of following; but it was very fairly admitted in the argument, that in the case of *Pawlet v. Delaval* there were acts, positive and open, of acquiescence. She had dealt with the amount, and treated it in a particular way, as if she had adopted that view of the case; but in the present case she has done nothing. In my opinion that does not bind her, there being no act of acquiescence during those three years.

The next question is with respect to the trustees, whether they were justified in acting as they did, having regard to the orders of the Court. It was very justly urged that this was a hard case; but, unfortunately, all cases in which the Court compels trustees to return trust money, where the trustees have not had the benefit of it, are cases of more or less degree of hardship. Here the trustees, in my opinion, parted with a fund which they were bound to retain, and they must, therefore, replace it. I am disposed to think, although it is not necessary to express an opinion, that although the married woman had no power to dispose of the fund, she might have asked the Court to put it in strict settlement, if she had thought fit. To use the expression of the Vice-Chancellor of *England* in the well-known case of *Bishop v. Colebrook* (a), if she had come to the Court to ask the Court to settle the fund, she might have had it settled, although she could not dispose of it. But I cannot deal with that case as an authority upon which I can now act. If the trustees thought there was any question or doubt about it, they ought to have come for the authority of the Court. And even in cases where this Court will allow married women to part with a fund, it does not allow them to do so out

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(a) 16 Sim. 39.

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of Court, and without the protection which the Court affords to acts of this character.

I am, therefore, of opinion that the trustees must replace the fund. I think, however, that must be done without costs, as part of the suit has failed and part of it has succeeded. The better plan, therefore, is to say it shall be done without costs on either side. The amount of stock must be replaced by the representatives of the trustees and paid into Court, and the dividends must be paid to them until further order.

*In re THOMPSON'S TRUSTS.*

Aug. 1.

A testator devised a real estate to his widow for life, and at her death to trustees to sell and pay part of the proceeds to *B.*, who committed a felony, but had undergone his punishment before the widow's death. Held, that his interest was not forfeited to the Crown.

The same testator directed his trustees to provide a fund, out of

his personalty and other real estate, to secure an annuity for his widow. The fund was provided. Held, that *B.*'s interest, being vested, became forfeited to the Crown, by his conviction for felony in the widow's life, though he had undergone his punishment previous to her death.

**A** TESTATOR, by his will dated in 1849, devised two tenements to his wife for her life; and he devised all other his real estates, and also the said real estate devised to his wife for life (from and after her decease), unto trustees, upon trust that they should, at such time after the testator's decease as they should think fit, sell the said real estate, except the said premises devised to his wife for life; and after the decease of the testator's wife, to sell the said premises devised to testator's wife for life; and he directed that the trustees should stand possessed of the moneys to arise from such sales upon the trusts thereafter declared. The testator also gave and bequeathed the residue of his personal estate unto the trustees, upon the trusts thereafter declared; and he

he declared, that the trustees should stand possessed of the moneys to arise from the sale of his real estate and his said personal estate, upon trust as therein mentioned. And as to the residue of the said trust moneys, to pay and discharge his debts, funeral and testamentary expenses; and, in the next place, to invest a sufficient sum to produce 50*l.* per annum, to be paid to his said wife for life, and upon trust, as to all the residue of the said trust moneys (after satisfying the purposes aforesaid), from and after the decease of the said testator's wife, to pay the same equally between the testator's sons *Robert* and *Charles*, and his daughter *Selina*, as tenants in common.

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The testator died in *February*, 1851. The residue of his personal estate, and such part of the real estate as was saleable during the life of the widow, were converted in that and the following year by the executors and trustees, and applied in payment of the testator's debts, &c. This absorbed the produce of the whole of the residue of the personal estate, and part of the proceeds of the real estate then sold.

The trustees retained 2,000*l.* to provide for the annuity of 50*l.* for the life of the widow, and this, and the freehold tenements devised to the wife for life, comprised the whole of the testator's estate in their hands.

The son *Robert* was on the 6th of *April*, 1853, tried and convicted of a felony, and sentenced to one month's imprisonment, and he thereupon underwent that sentence.

After this, the widow died on the 26th *November*, 1854. Shortly afterwards the trustees called in the 2,000*l.*, and sold the freehold tenements devised to the wife

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wife for life, and they paid the share of *Robert* into Court, under the Trustee Relief Act, to abide the order of the Court.

This share consisted of two sums; 682*l.* 19*s.* 4*d.*, as the proportionate part of the 2,000*l.*, and 524*l.* 15*s.* 1*d.*, the proportionate part of the proceeds of the real estate sold after the death of the widow.

A Petition was now presented, praying that these sums might be paid to *Robert*.

Mr. *Prendergast* and Mr. *Whiteley*, in support of the Petition, contended, that as to the first sum, the title of the Petitioner first accrued on the death of the widow, and that it had not vested in possession until that time. That undergoing the sentence, in pursuance of the conviction, was, under the 9 Geo. 4, c. 32, s. 3 (a), equivalent to a pardon; that, as the right to receive the share of the fund produced by the sale of the real estate in the lifetime of the widow had not accrued until her death, no interest in that part of the fund had vested in the Crown; *Stokes v. Holden* (b); *Taylor v. Haygarth* (c); *Matson v. Swift* (d), and *Gough v. Davies* (e).

That as to the proceeds of the real estate sold after the death of the widow, there could be no doubt.

Crown

(a) This section is as follows: "Whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, not capital, who have undergone the punishment to which they were adjudged, be it therefore enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punish-

ment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the Great Seal, as to the felony whereof the offender was so convicted."

(b) 1 *Kerr.* 145.

(c) 14 *Simp.* 8.

(d) 8 *Barr.* 368.

(e) 2 *K. & J.* 623.

Crown had no equity to compel the trustees to convert into personality real estate devised to the widow for life, and that continuing real estate at the time of her death, it had not escheated or become forfeited to the Crown; *Walker v. Denne* (a); *Du Hourmelin v. Sheldon* (b).

**Mr. Wickens**, for the Crown. As to the first sum, it had been converted into personality at the time of the conviction, and the Petitioner had then obtained a complete vested interest in his one-third share of the amount payable on the death of the widow, and whatever interest was in the convict at the time of conviction passed to the Crown. The effect of undergoing the sentence did not take away the right of the Crown once vested in it.

**The Master of the Rolls** considered that, as to the share of the real estate sold after the death of the widow, it did not pass to the Crown; but as to the share of the fund which had been converted into personality at the time of the conviction, it was clearly a vested interest in the Petitioner, and as such passed to the Crown.

He ordered the costs to be payed rateably out of the two funds.

(a) 2 *Ves. jun.* 170. (b) 4 *Myl. & Cr.* 525.

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NOTE.—See also *Harrop's Estate*, V. C. K., 28th March, 1857.

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*June 23, 24.**July 23.*

On the sale of a copyhold manor, it was stated, that the "fine was two years' improved value."

The 8th condition enabled the vendor, in case of any objection to title, to rescind, and the 11th condition provided for compensation in case of mistake or error. The abstract was delivered, and no objection was taken to the title, within the time prescribed for that purpose. Subsequently, some doubt arose as to whether the fine was of one or two years' improved value. Held, that (so far) the Plaintiff was

entitled to specific performance with a compensation; but the purchaser having afterwards raised a question as to title, and filed a bill for specific performance, the vendor, on the same day, gave notice to rescind. Held, that although the objection as to title was waived at the bar, the vendor had a right to insist on the contract having been rescinded, and the bill was dismissed.

Special conditions of sale are construed most strictly against the vendor.

By the 8th condition of sale, a vendor reserved a right to rescind, in case of objection to title, &c., and by the 11th, misdescriptions were not to annul the sale, but be the subject of compensation. *Sensible*, that the 8th condition did not apply to cases of misdescription within the 11th condition.

## HOY v. SMYTHIES.

THIS was a bill by the purchaser against the vendor for the specific performance of an agreement for the sale of a manor, and for compensation for misdescription.

On the 6th November, 1854, the Plaintiff entered into a contract for the purchase of Lot 15 contained in the particulars of sale, subject to certain conditions.

Lot 15 was described as "The Manor of *Pembroke Foreign*;" but the Defendant *Smythies*, before the execution of the contract, added in ink:—"Fine two years' improved rent or value of the copyhold estates, parcel of the manor."

By the seventh condition of sale, the purchaser was allowed twenty-one days, from the delivery of the abstract, to take objections and make his *requisitions upon the title*. The eighth condition was as follows:—"If any purchaser insist on any objection or requisition, as to the vendor's title, the abstract of title, evidence of title, conveyance or otherwise, which the vendors shall be unable

*unable or unwilling to answer, remove or comply with,* the vendors may, by notice in writing, to be given to such purchaser or his solicitor, at any time and notwithstanding any negotiations respecting such objection or requisition (not being an express waiver of this condition) *annul the contract;* and in such case, the vendors shall repay to the purchaser his deposit, without any costs, interest or damages whatever, and this condition shall not be limited by the *eleventh condition.*"

The *eleventh condition* was as follows :—"The particulars are believed to be correct; but no mistake, as to quantity or tenure, or other error or omission in the particulars, as to the description or quality of the property, or as to any charges thereon, or as to the vendor's interest or otherwise, if capable of compensation, shall annul the sale, but a compensation (proportionate to the purchase-money) shall, in every case, be given or taken, as the case may require, to be settled by two referees or their umpire," &c. &c. "But this condition shall not limit the vendor's right to rescind the contract under the eighth condition."

On the 15th November, 1854, an abstract of the Defendant's title was delivered. No question then turned upon the title.

Early in December following, Mr. Cuddon, as agent for the Plaintiff, went into Herefordshire, with a view of making inquiries as to the manor, who then discovered, that the fine payable upon death or alienation, in respect of copyhold hereditaments held of the manor of Pembridge Foreign, was not and had never been two years' improved value, but only one year's improved rent or value.

On the 5th December, 1854, the Plaintiff's agents  
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wrote to the Defendant *Smythies*, stating that they had no objection or requisition to make as to the vendor's *title*, "so far as the abstract goes." They proceeded to inform the Defendant, that the steward of the manor had stated, that the fine was one and not two years' value, and required compensation for the erroneous statement.

Previously to the sending of this letter, an interview had taken place, on the 1st of *December*, between the Defendant Mr. *Smythies* and the Plaintiff's agent Mr. *Cudden*, when, after some conversation as to the amount of fine, the Defendant, still asserting his belief that the fine was two years' value, offered to rescind the contract, or to try the right at law, and complete the purchase, if successful. This, however, was refused by the Plaintiff's agent, who said he demanded 1,000*l.* by way of compensation for the alleged misdescription.

On the 7th *December*, the Defendant Mr. *Smythies* wrote a letter to the Plaintiff's agent, which, after entering into the question of the fine, proceeded as follows:—"The offer I made you to rescind the contract was perfectly fair, &c. &c. You cannot compel specific performance with compensation, even if you could prove my statement erroneous; first, because the eleventh condition states:—' But this condition shall not limit the vendor's right to rescind the contract under the eighth condition ;' and secondly, because the words 'if capable of compensation' exclude this case."

On the 13th of *December*, the Plaintiff's agent wrote a letter to Mr. *Smythies*, which, after explanations as to the question of the amount of fines, proceeded as follows:—"We are advised that we ought to insist on

some

some further title to the property than the mere power of sale contained in the deed of 1806. That power authorized the trustees to sell forthwith, for the purpose, as appears by the recitals, of paying the debts of James Kinnersley, which his personal estate is said to have been insufficient to pay. Surely, therefore, some explanation is necessary, to shew why the sale has been delayed for nearly half a century, and that the power still subsists. You will at once see, that this is not an ordinary case of a trust for sale, where the proceeds are to be divided among the children or other *cestuis que trust*, and where the property is converted in equity into personality merely for the sake of convenience in dealing with it. Moreover, should you be unable to shew that the fine is two years' value instead of one, there can be no difficulty in ascertaining the fair compensation ; and we altogether deny the construction you put upon the eighth and eleventh conditions, under the circumstances of this case and your foreknowledge of the matter."

In answer to this, a letter was written by the Defendant *Smythies*, dated the 19th *December*, 1854, from which the following is an extract :—" As to your new objection to the title received on the 14th, and twenty-nine day after you received the abstract, it is, by the conditions, too late, especially after you had formerly accepted the title by your letters of the 5th and 8th. No doubt, the counsel who advised the acceptance of the title knew, from the case of *Forbes v. Peacock* (a), that the objection is not tenable."

This bill was filed on the 18th of *December*, and a copy, but not a perfect copy, served on that day.

On

(a) 1 *Phil.* 717.

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On the 20th *December*, 1854, the day on which the complete copy of the bill was filed, the Defendant Mr. *Smythies* wrote the following letter to the Plaintiff's agents:—"Sir,—As the only mode of escaping a chancery suit, which I cannot win without expense, I now annul the contract made for the purchase of the above manors on the 6th *November* last, as I am empowered to do by the eighth condition of sale. The deposit of 500*l.* shall be repaid on receiving your instructions as to the mode of doing so. I am, &c."

The deposit was sent to the Plaintiff's town agents, but was returned by them to the Defendant.

The evidence and the passages in the Defendant's answer, which bear upon the points of the case, are referred to in the judgment of the Master of the Rolls.

**Mr. R. Palmer** and **Mr. Karslake**, for the Plaintiffs.  
Special and oppressive conditions of sale of this de-  
scription are discountenanced and construed strictly;  
*Hyde v. Dallaway (a)*; *Morley v. Cook (b)*. But these  
conditions, taken together, are not such as enable the  
vendor to rescind the contract. The eleventh condition  
provides for compensation in the event of error or mis-  
description, and the eighth, which gives the vendor a  
right to annul the contract, only takes effect in case of a  
real difficulty as to title. Here the only objection is the  
*quantum* of the fine, and to this, the eleventh condition  
alone is applicable. The vendor cannot rely on his  
misrepresentation, as to the amount of the fine, as a  
ground for rescinding the contract, but it must be per-  
formed with a compensation. The case is precisely  
within the rule established by *Painter v. Newby (c)*,  
and

(a) 4 Bear. 608.

(b) 2 *Hare*, 106.

(c) 11 Hare, 26.

and *Nelthorpe v. Holgate* (*a*). The continuance of the correspondence after the offer to rescind, was a waiver of the condition; *Morley v. Cook* (*b*); and the vendor could not afterwards fall back upon it; *Tanner v. Smith* (*c*). Secondly. As to the right to compensation. The vendor had full means of knowing what the fines payable in respect of the copyhold lands in *Pembridge* manor were, and he describes them of two years' annual value. This turned out to be doubtful, but the purchaser is willing to accept the title upon receiving a fair compensation, to be ascertained by the value of the fines really payable. In *Nelthorpe v. Holgate* (*a*), "a vendor contracted to sell an estate in fee, with a stipulation, that if any dispute should arise as to the title, the same should be submitted to some eminent conveyancer, and that in case he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract, it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser, it was held, that the vendor was not entitled to rely on the before-mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed, with compensation in respect of the life interest." So where a manor being advertised for sale, the fines were described as arbitrary, and it appeared that they were so only on alienation; compensation was decreed; *Cudden v. Cartwright* (*d*).

**Mr. Lloyd** and **Mr. Smythe**, for the Defendant.  
By the common law the fines due to the lord are presumed

(*a*) 1 *Coll.* 203.  
(*b*) 2 *Hare*, 106.

(*c*) 10 *Simp.* 410.  
(*d*) 4 *Y. & Coll. Ex.* 25.

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sumed to be arbitrary, to the extent of two years' annual value; *Denny v. Lemman* (*a*); and the mode of assessing the fine is shewn by the Court Rolls, to which the Plaintiff had full access.

[*The Master of the Rolls, as to the mode of assessing fines, referred to Wilson v. Hoare* (*b*).]

The very question as to the amount of fine payable in respect of copyholds in the manor of *Pembridge* has been judicially investigated, and an arbitrary fine established; *Doe d. Twining v. Muscott* (*c*). There the Lord Chief Baron ruled, that "there was some evidence for the jury of the fine being reasonable, that is, that it did not exceed two years' improved value." The vendor, at the time of sale, was in the firm conviction that the representation in the particulars was the true one; it was neither wilful nor fraudulent. The representation could, however, only be considered as imperfect. The thing for which compensation is asked is uncertain, and cannot be ascertained by any reference to value. The Defendant has always claimed, now claims and thinks he has a right to claim an arbitrary fine, that is, two years' improved value. Secondly. The Defendant has a clear right to rescind the contract under the terms of the eighth condition. They are plain and unambiguous; and even if there should be an apparent ambiguity as to the words "or otherwise," that is cleared up by reference to the context; it must mean something other than "title" or "conveyance." As to the case of *Painter v. Newby*, upon which the Plaintiff chiefly relies, there a formal notice to rescind had not been given. In the present case, the Defendant gave notice

(*a*) 1 *Scriv.* 421; *Hob.* 135. (*b*) 2 *Bar. & Adol.* 350.
 (*c*) 12 *Mees. & W.* 832.

tice to rescind before a complete copy of the bill had been filed.

Mr. Karslake, in reply. The difficulty of fixing the amount of compensation is not a sufficient answer to the claim, but in the present case there is none. The notice to rescind was an afterthought, and the inquiry as to who were the *cestuis que trust*, was not a requisition as to title within the terms of the seventh condition.

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*The MASTER of the ROLLS.*

This bill is filed for the specific performance of a contract for the sale of a manor. The Plaintiff insists on the contract, but requires compensation, by reason of an alleged misdescription in the particulars of sale. This is contested on the other side; and it is also alleged, that if the Defendant should fail in this respect, he has put an end to the contract by giving a notice under the eighth condition of sale. The subject-matter of the purchase is the manor of *Pembridge Foreign*, in the county of *Hereford*, and is thus described in the conditions of sale:—"Lot 15. The manor of *Pembridge Foreign*. Fine, two years' improved rent or value of the copyhold estates, parcel of the manor."

The Plaintiff alleges, that he bought on this representation, and that he has since discovered, that the fine is one year's improved value and not two, and he seeks compensation in this respect. The Plaintiff gave 3,000*l.* for this and Lot 14, and paid a deposit of 500*l.* It was stated, at the sale, by the Defendant to Mr. Pen-fold,

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*fold*, on behalf of the Plaintiff, that some of the late tenants of the manor had, by mistake, been admitted at a fine of one year's rent only, and it was in order to avoid any mistake, that the Plaintiff caused the amount of fine payable to be written on the printed conditions of sale before he entered into this contract.

The contract was entered into on the 6th *November*, 1854. At the close of that month, Mr. *Cuddon*, on behalf of the Plaintiff went down to the manor of *Pembroke Foreign*, to make inquiries on the spot as to the condition and state of payments of the manor. He was then informed by Mr. *Wodehouse*, the steward of the manor, that only one year's rent was taken as the fine, and not two years'.

The result of the evidence, on this part of the subject, may be shortly stated to be this:—It is, in my opinion, proved, that, for some time past, only one year's improved value has been taken as a fine, but that two years' improved value has been and is claimed by the lord of the manor. It is proved, however, that some time prior to the sale, the Defendants gave express directions to the steward not to admit any tenant without a payment of a fine of two years' improved value; that this was intended to be acted upon, but that since the directions were given, no opportunity had occurred of imposing this fine; that the attempt to enforce it would probably create litigation with the tenants of the manor, possibly of an expensive character; and the purchaser swears, that on purchasing, he did not suppose that a law suit would be necessary, to enable him to enforce payment of the fine as stated in the conditions of sale.

In this state of circumstances, the Plaintiff seeks compensation, on the ground that it is proved that one year's

year's improved value is the only fine which can in fact be taken.

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The Defendant, on the contrary, insists, that by law, the lord of the manor is entitled to levy a fine of two years' improved value. He swears that in the interview with Mr. *Penfold* prior to the sale, he informed him, that the claim to a fine of two years' improved value would probably lead to litigation. After the contest arose, he offered either to rescind the contract or try the question at law, and to complete the sale in case of success. This was declined on the part of the purchaser, and the present bill was filed for a specific performance of the contract, with a compensation in consequence of this misdescription.

If the matter rested here, the fact of the amount of fine properly leviable being disputed, I should have been of opinion, that it would be necessary for me to put the matter into a course of inquiry, either in chambers or by some proceeding at law, for the purpose of ascertaining, whether the fine is properly one or two years' improved value; as I consider it certain, that in the ordinary case of misdescription, by stating the fine to be two years' improved value instead of one, the purchaser would be entitled to insist on specific performance with a compensation.

This raises the next question, which arises on the conditions of sale. The eighth condition is in these words:—[*The Master of the Rolls here read the eighth and eleventh conditions.*] The bill was filed on the 18th December, 1854, and the notice to rescind was served on the 20th December, 1854. On this point, the question principally argued before me was, the construction of the conditions of sale, and whether the eighth

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eighth condition applied to any case of misdescription included in the eleventh condition of sale. If it were necessary to decide this point, according to my present view of the question, I should be of opinion, that the eighth condition of sale did not apply to any case of misdescription under the eleventh condition; but, upon a careful perusal of these papers, I have come to the conclusion, that the notice to rescind the contract is valid and effectual according to the true construction of the conditions of sale. This point did not appear to me with sufficient distinctness at the hearing or until I had quietly read over the papers.

On the 13th *December*, 1854, the purchaser, wrote this—[*His Honor here read the letter of the 13th December*, 1854. See *ante*, p. 512.] To this an answer was sent by the Defendants on the 19th—[*His Honor here read the extract set out at p. 513.*] On the 18th, as I have stated, the bill was filed, and a copy, but not a perfect copy, served on that day. On the 20th *December*, the Defendant wrote the letter rescinding the sale. Now, referring to the eighth condition of sale, the Plaintiff, in the letter of the 13th *December*, which I before read, expressly raised the question of the necessity of further title, and this is clearly within the terms of the eighth condition of sale, indeed the bill raises the same question; and, although that is waived at the Bar, it was, in my opinion, sufficient to justify the Defendant in sending the notice to rescind.

In these cases, the conditions are to be construed most strictly against the vendor, and I shall always do so; but still a meaning must be given to them, such as they fairly bear, and this has no other.

I am surprised that purchasers can be found to bid,  
where

where such conditions are imposed, and only last week, sitting in chambers, I interposed a difficulty to the laying out of a ward's money in bidding for property, where there were similar conditions of sale. Vendors, however, submit to the reduction of price, arising from diminished competition springing from this circumstance, and the purchaser bids and contracts with his eyes open.

In this case, therefore, the bill must be dismissed, on the ground that the contract was, in the circumstances of this case, fully and effectually rescinded under the eighth condition of sale and by the notice of the 20th *December, 1856.*

The costs must follow the result, from the period of the receipt of the notice.

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The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charter-party, without the mention of the word "freight."

In equity, an assignment of freight to be earned is valid.

A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after C.'s assignment; but C. gave the first notice to the charterers. Held, that C.'s right to the freight had priority over B., but not over A.

One who is interested in the freight alone, severed from the ship, held liable to contribute his proportion of the expenses incurred by the ship in earning the freight.

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BY a charter-party, dated the 27th of April, 1854, Mr. *Hammond*, the owner of a ship called *Genghis Khan*, chartered her to the Defendants Messrs. *Gibbs* for a voyage to *Moreton Bay, Australia*, and from thence to *Peru*, to load and bring to this country a cargo of guano, at a certain rate of freight. Mr. *Hammond* was described in the charter-party as *owner* of the ship. On the 1st of June, 1854, *Hammond* executed bills of sale of 24-64ths of the ship to *Briggs* and three other Defendants, which were registered in September and November, 1854.

In June, 1854, *Hammond* also executed bills of sale of the remaining 40-64ths of the ship to eleven other of the Defendants, but which were not registered until between the 5th and 26th of January, 1855.

In the meanwhile, the Plaintiffs Messrs. *Lindsay*, who were under liabilities for *Hammond*, required security, and he offered them the freight which would become payable by Messrs. *Gibbs* under the charter-party of the *Genghis Khan*. The Plaintiffs accepted this security, and *Hammond* thereupon wrote and delivered to the Plaintiffs a letter in the following terms:—

“ 29th December, 1854.

“ Messrs. *Anthony Gibbs* and Sons.

“ Gentlemen,—We hereby assign to Messrs. *W. S.*

Lindsay

Lindsay and Co. the freight which will become due from you to us, on the delivery of the cargo shipped by your house abroad, in the ship *Genghis Khan*, in the month of November last, to the extent of 4,300*l.* sterling; and we therefore request you to hold this amount at their disposal, whose receipt for the same shall be binding on us.

“ *W. P. Hammond and Co.*”

On the same day, the Plaintiffs communicated this letter and produced the original to Messrs. *Gibbs* and *Co.* At this time, no other person had given any notice to *Gibbs* and *Co.* of any other assignment of this freight.

The *Genghis Khan* returned to the port of *London* in *June*, 1855, having on board a cargo of guano, loaded under the above charter-party. The cargo was delivered to Messrs. *Gibbs* and Sons, and a sum, exceeding 8,000*l.*, was still due from them on the charter-party in respect of the freight.

Messrs. *Gibbs* and Sons declined paying the amount, on the ground of the conflicting claims to it.

It was not denied, that the notice given by the Plaintiffs to Messrs. *Gibbs* and *Co.* was prior to any notice given by the Defendants, and the Plaintiffs claimed a lien on the freight for the amount due to them.

Mr. *Rouppell*, Mr. *Cairns* and Mr. *Tomlinson*, for the Plaintiffs. Messrs. *Lindsay* claim nothing as against the ship; but it is well settled, that freight may be wholly independent of the vessel; *Splidt v. Bowles* (*a*); and that the right to the vessel may be separated from the right to

(*a*) 10 *East*, 279. See also *Stephenson v. Dawson*, 3 *Beav.* 344.

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to the freight. Although the Ship Registry Acts may prevent the Court from considering any one but the registered owner as the owner of the ship, where the right to the ship is in question, still that will not prevent the parties dealing as regards the freight on a different footing; *Davenport v. Whitmore* (*a*); *Re Ship Warre* (*b*). *Hammond* being described as the owner of the ship in the charter-party, no evidence is admissible to shew that any other party was so; *Humble v. Hunter* (*c*). The assignment by *Hammond* of the freight was immediately after the sailing of the vessel on her outward voyage to earn it, and the effect of the notice given to the charterer perfected the Plaintiffs' title by the transfer; *Douglas v. Russell* (*d*); *Gardner v. Lachlan* (*e*). It does not appear that at the time of the purchase of the 24-64th shares of the ship, any inquiry was made by the purchasers as to the position of the ship at the time. If there had been, they would have ascertained that she was then on her voyage under the charter-party, earning this freight. The registry of the 40-64th shares was long after the assignment of the freight; and although the transferees of the 24-64ths were equitable owners of a *chase in action*, they had not perfected that ownership by notice. They thus left *Hammond* as the ostensible owner of the ship. A transferee becoming so after the sailing of the vessel, and never having taken possession, could only take her subject to the contract which had been entered into with the charterer, and subject to the equities which had previously arisen; *Morrison v. Parsons* (*f*). *Gibbs* and Co., the consignees of the cargo, having received it in pursuance of the usual bills of lading,

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| (<i>a</i>) 2 <i>Myl. & Cr.</i> 177—190. | appeal. |
| (<i>b</i>) 8 <i>Price</i> , 269, note. | (<i>e</i>) 4 <i>Myl. & Cr.</i> 129. |
| (<i>c</i>) 12 <i>Q. B. Rep.</i> 310. | (<i>f</i>) 2 <i>Taunt.</i> 407. |
| (<i>d</i>) 4 <i>Sim.</i> 524. Affirmed on | |

lading, have, at law, made themselves debtors for the amount of freight; *Abbott* on Shipping (*a*); *Sanders v. Vanzeller* (*b*). The charter-party is the superior and paramount contract, governing the title to the freight, and no suggestion is made, that the character of the cargo or of the freight earned has been changed. *Gibbs and Co.* interpledged at law, and it is a recognized rule, both at law and in equity, that no new contract, express or implied, must be entered into as to the subject-matter of the thing in contest. Courts of Law have carried out as far as possible the rules of Courts of Equity as to the assignment of a *chase in action*, which requires notice to perfect the title; *Tibbits v. George* (*c*).

Mr. *R. Palmer* and Mr. *Cole*, for the four Defendants, the transferees of 24-64ths of the ship. It is quite clear, and is a principle well established, that if a ship be sold, the vendee is entitled to the freight as an incident to the ship; *Case v. Davidson* (*d*). So by the mortgage of a ship, accruing freight will pass to the mortgagee; *Dean v. M'Ghie* (*e*). The charter-party leaves the ship in the possession of the owners, and it is to be navigated by them on account of the owners of the ship for the time being. These four Defendants were, at this time, complete owners of 24-64ths of this vessel. Thus, if payment of the freight, or so much of it as was attributable to 24-64th of the ship, had been made to them by the charterers, it would be an answer at law to an action by the party who entered into the charter-party. This contract, on the face of it, professes to be made on behalf of the "owners," and not merely for the owner whose name is attached to it as a party (*f*).

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(*a*) Edit. 9, page 346.

(*d*) 5 *Maule & S.* 79.

(*b*) 4 *Q. B. Rep.* 260, affirmed
by Ex. Ch.

(*e*) 4 *Bing.* 45.

(*c*) 5 *Adol. & E.* 107.

(*f*) In the charter-party where
the word 'owners' first appears,

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If the Plaintiffs had made due inquiry, they would have found that the 24-64ths in the ship had been sold, and the reason they did not make inquiry is apparent on the face of the bill:—it was their anxiety to obtain some available security, and there was, in fact, no consideration for this security; it was given for a pre-existing debt. Freight is not analogous to a debt which is due and payable at a given time, but freight only becomes due and payable on the arrival of the vessel. The case is like that of a carrier, to whom nothing is due until the goods are delivered. At the time of the assignment there was nothing earned, and these Defendants had, as registered owners, to the extent they were interested, possession of the very thing which was to earn this freight. The necessity of bringing an action at law in the name of the party whose name is attached to the charter-party is merely a technical rule of pleading. The consideration for the payment of the freight is the delivery of the goods, and on such delivery a new contract arises; *Kemp v. Clark* (*a*). Possession of a ship is not similar to possession of a *chuse in action*, it is complete without notice, and the doctrine of notice is not to be extended; *Jones v. Smith* (*b*). 2nd. All the expenses must be deducted from the gross amount of freight before any division of freight. The owners of a ship are tenants in common and jointly interested in her use and employment, and being similar to a partnership the expenses are the first charge upon the profits or freight earned; *Green v. Briggs* (*c*); *Cato v. Irving* (*d*); *Alexander v. Simms* (*e*).

Mr. Selwyn, for the other Defendants, the owners of the
40-64th

the final letter (s) had been struck through with a pen, and it was stated that the same should have been done throughout.

(e) 12 Q. B. Rep. 647.

- (b) 1 *Hare*, 43—55.
- (c) 6 *Hare*, 395.
- (d) 5 *De G. & S.* 210.
- (e) 18 *Barr.* 80.

40-64th shares. The title of all the owners of the ship was complete both at law and in equity before any part of the freight was earned. The contract of affreightment is an onerous one on the owners of the vessel, and the construction of that contract must be in favour of the owners; they have completed their part of the contract, which is to carry the cargo, whereby the freight has been earned. They have discharged the burdens of the contract, they are entitled to the benefits of it. If the ship had been lost, the owners would have been the losers. The owners, by their purchase, were in a precisely similar situation to mortgagees in possession. Whenever in the charter-party the phrase is used of "benefit to the ship," it must be construed to mean "benefit to the owners." All expenses of the ship, freight, &c. must be first paid out of the gross amount.

Mr. *Lloyd*, for the assignees of *Hammond*, who had become bankrupt.

Mr. *Rouppell*, in reply, was required by the Court to apply himself to the case of the owners of the 24-64ths.

The Plaintiffs were not bound to inquire as to the ownership of the ship at the time of the assignment to them of the freight. As to that, the charter-party shewed a sufficient title in *Hammond*, and the charterers (Messrs. *Gibbs* and Co.) had no notice of any other charge or claim to this freight. If inquiry had been made as to the ownership of the ship, nothing would have appeared as to the ownership of the freight. This was clearly separable from the ship, and a contract in respect of freight to be earned is valid. The Defendants were culpably negligent in not making inquiry as to the position of the ship at the time when it was in

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process of earning that which was comprised in the charter-party. The cases of *Green v. Briggs*, *Cato v. Irving*, and *Alexander v. Simms* were all cases of mortgagees. *Douglas v. Russell* should govern the present case.

July 24. *The Master of the Rolls.*

There is not much difficulty in this case upon the facts before me, and having regard to some principles of law which appear to me to be reasonably clear.

In the first place, I do not doubt, that the right to freight is incidental to the ownership of a ship, and that the owner of the ship is the person who has a right to the earnings made by it; and although it may be very true that there are distinctions made between the ownership of the ship and the right to the freight, in particular cases, at law and in equity, yet, as a general proposition, the right to the freight is incidental to the right to the ship. I think it is equally clear, that in equity an assignment of freight not yet due, but to be earned, according to the contract for the hire of the vessel, is a perfectly good assignment, and is binding in this Court. But that is an assignment which originally can only be made by the person who is the owner of the ship. The person who has the benefit of the contract may of course transfer it to another person, but the right to freight, being incidental to the right to the ship, no person can assign the freight who has not a right to the freight, that is, who is not the owner of the vessel.

In the month of June, 1854, the Defendants *Gibbs*, *Robinson*, *Hartley* and *Pinnock* had purchased 24-64ths in

in this ship, and were the registered owners, that is to say, the last of them was registered on the 26th November, 1854. In that state of things, a month afterwards, in December 1854, an assignment was made of the freight of the whole vessel to the Plaintiffs by Mr. *Hammond*, as a security for moneys previously advanced. I am of opinion, that he had no power to make that assignment, that so far as he was not then the owner of the vessel, he had no right to the freight, and that it was only so far as he was owner of the vessel that he had any power to make that assignment, and I feel this the more strongly, because I am satisfied that a person taking an assignment of freight under these circumstances, and knowing, as in my opinion he is bound to know, that the freight goes with the ownership of the vessel, is bound to ascertain, whether the person who professes to assign to him the freight is, in point of fact, the owner of the vessel. He has the easiest mode of ascertaining it, he has but to refer to the register of the vessel, to ascertain who is the registered owner of the vessel. If he be the registered owner, the matter is at an end, and then he has a right to the freight, and may assign it. If the Plaintiffs had searched on this occasion, they would have found, that *Hammond* was only the owner of 40-64ths, and therefore, that he had no power to assign the freight, except so much of the freight as was attributable to 40-64ths of the vessel. The right to the freight attributable to the rest of the vessel was assigned at the same time that he assigned over the shares of the ship: I think it impossible to maintain, that a person who assigns a share in a vessel does not also assign at the same time the earnings attributable to that share, without the word "freight" being mentioned in the assignment. Although there is this singularity in the English law, which pervades, I believe, the commercial law of no other country,

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of making a distinction between the right to freight and the right to the ownership of the vessel, and that the right to the earnings of the vessel does not, in every case, follow the ownership of the vessel itself (and which, in point of fact, has alone occasioned this question), yet there can be no question, that where a person sells a vessel, he sells the earnings of that vessel with it, as much as a person who sells a house, sells the right to receive the rent which is afterwards produced by the house. That being so, with respect to the 24-64ths the question is at an end, so far as respects the Defendants *Gibbs, Robinson, Hartley and Pinnock*.

But so far as regards the eleven other Defendants, who are the owners of the remaining 40-64ths, the case, in my opinion, is very different. They became the owners of these shares sometime between the 5th and 26th *January*, 1855. I take no account whatever of the circumstance, that they paid their money for the purpose of receiving their shares, in the month of *June* previously. I consider that the Ship Registry Acts are binding upon me in that respect, and that these Defendants took no interest whatever in the vessel until they had registered their interest in it, and that, accordingly, they are only to be treated as purchasers from *January*, 1855. Assuming they became purchasers in *January*, 1855, a person knows, that by the law of this country, the owner of a vessel may assign freight not actually payable, but to become due on a voyage then existing, and that a valid assignment of it may be made to him. When he is aware of that fact, I think it is his duty to inquire into the engagements of the ship, and the circumstances relating to it, and those circumstances could easily be inquired into, because if he went to the charterer and ascertained whether he had received any notice of assignment of the

the freight, and found that he had not, that would be quite sufficient. He has nothing to do but to buy the shares, and then he would have been a purchaser for value, without any notice whatever. He would then have given the first notice, if any notice were necessary on such an occasion.

But what do these Defendants do? They purchase the shares in the vessel; they allow Mr. *Hammond* to remain the ostensible owner, they enable him to raise money upon the hire of the vessel, and they do not think fit to register their shares until the month of *January* following. The result is, that it enables him to obtain money as if he were the absolute and beneficial owner of the property which they allow to remain in his hands, when their simple course was, to have caused their shares to be transferred on the register; which would have put an end to any question upon the subject. If I were to hold otherwise, the result would be this: if a man, for value received, assigns freight to be earned by a voyage which the vessel is then under contract to perform, he might, at any time, deprive the purchaser of the benefit of that transaction by selling the vessel, and thus, at any time before the cargo was actually delivered, by the sale of the vessel, to get a second time the value of the freight, notwithstanding the notice given to the charterers; and the owner of the vessel would then become entitled to the whole of the freight. I consider it no answer whatever to say, that the freight was not earned at that time, or that the freight is not payable until the vessel is discharged in the port and the goods actually delivered; because it is quite settled in various cases in this Court, that a good assignment may be made of freight which has yet to be earned under an existing charter-party.

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Then remains the only additional question, whether the Plaintiffs can take the amount which they claim without paying the charges upon the freight, and I am of opinion that they cannot. The question does not necessarily arise in every case, because I am not going to lay down the proposition, that the owner of a vessel may not contract with another, to give him the gross sum of freight to be received from the charterers. Such may be the contract between them, and I express no opinion whether such a contract would be binding against subsequent purchasers of shares in the vessel; but as between the owner who entered into the contract, and the person to whom the freight was assigned, I certainly do not mean to lay down that he could not, as between them, give the assignee a valid right to receive from the charterers the gross amount of the freight, and to leave all the charges to be borne by the assignor. I express no opinion whatever whether that would bind a subsequent purchaser, or whether it must not be held that a subsequent purchaser of the vessel had a right to have so much of the freight applied in payment of those expenses, without which no freight would have been earned. But in this case, I think it unnecessary to discuss that question, because, at the time when this contract was entered into for the assignment of the freight, there were persons who, in respect of 24-64ths, were part owners of the vessel; the consequence of which is, as was laid down in *Green v. Briggs* (a), that as between them and the assignor of the freight, it was in the nature of a partnership; and all the charges must be paid in the first instance, before any division of profits can be made between them. Therefore I have no doubt that, independent of any other question, all the charges which properly fall upon the owners must be paid in the first instance, and that then

(a) 6 *Hare*, 395.

then the nett balance must be divided into sixty-four parts, of which 24-64ths go to the four defendants on the record who owned those shares, and the remainder to the Plaintiffs.

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*July 19, 20,
21.*

THIS was a suit for the specific performance of an agreement of a lease of a certain mining property. It was resisted, first, on the ground of misrepresentation; and secondly, that the Defendant, after due notice, had rescinded the contract. The agreement between the Plaintiff and Defendant, dated the 4th October, 1855, provided as follows:—

"1st. Mr. *Macbryde* agrees to grant a lease of his present freehold of about five and a half acres of mineral land, situate," &c., "for twenty-one years, to Mr. *Weekes*, renewable at the end of that time, if desired by Mr. *Weekes*.

"2nd. Mr. *Macbryde* also agrees to purchase the adjoining field of about four acres, now belonging to

In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix reasonable time for completion, and, on the lessor's default, may rescind the contract.

Mr. *A.*, on the 4th of Oct.

contracted to grant a mining lease to *B.*, and no time was mentioned for completion. On the 10th of Dec. *B.* gave notice to *A.* that unless he completed the contract within a month, he would rescind the contract. Held, on *A.*'s default, that *B.* was justified in giving the notice, that the time was reasonable, and bill by *A.* for specific performance was dismissed with costs, although there were matters essential for the completion, which did not depend on *A.*, but on third parties.

A. purchaser, offering to perform his part of the contract, required, by notice, the vendor to complete within a month. Held, that the purchaser could not afterwards set up, as a defence to a suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice.

A. agreed to grant a lease to *B.* After considerable delay on the part of *A.*, *B.* gave *A.* notice, that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, *A.* forwarded to *B.* the drafts, but he furnished no abstract, nor shewed that he was in a situation to complete. *B.* rescinded the contract. Held, that it was effectual, and the Court dismissed *A.*'s bill for specific performance with costs.

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Mr. *Strongitharm*, and to grant a similar lease of it to Mr. *Weekes*.

"3rd. Mr. *Macbryde* further agrees to procure the assignment of the lease of about twelve acres of mineral land, now held by his brother *James Macbryde*, from Mr. *Neville* to Mr. *Weekes*.

"4th. Mr. *Macbryde* also agrees to sell to Mr. *Weekes* the whole of the plant, engines, shafts, tools, brick-kilns, offices, weighing machines, &c. on the joint estates.

"5th. Mr. *Macbryde* will exercise all his influence to procure an extension of Mr. *Neville's* lease to twenty-one years, and to obtain a modification of the final levelling clause in that lease.

"Next, Mr. *Weekes* agrees to pay 1,500*l.* for the lease of the twelve acres from Mr. *Neville*, the lease of the nine and a half acres from Mr. *Macbryde*, the engines, plant, brickkilns, buildings, &c. &c. in the following manner." It then provided for the payment by instalments, the first to be paid "on being put in possession legally."

The agreement then went on to specify the royalties in minerals, and surface rent, which was to be paid by Mr. *Weekes*.

The Plaintiff proceeded to purchase the field mentioned in the second clause, and on the 5th *November*, 1855, Mr. *Strongitharm* (the owner of the field) agreed to sell it to the Plaintiff for 560*l.* On the 12th of that month, a meeting took place between the Plaintiff and Mr. *Neville*, in the presence of the Defendant, when Mr. *Neville*, in consideration of 200*l.*, gave his consent in writing to the assignment to the Plaintiff of the lease mentioned in the third clause, or to the Defendant as his

his nominee. Such lease contained a restriction against any assignment thereof by the lessee, without the written consent of the lessor. The Plaintiff thereupon gave Mr. *Neville* two promissory notes of 100*l.* each in payment of the 200*l.* Mr. *Neville*, however, refused to extend the term granted by the lease, or to allow any modification of the clause referred to as "the levelling clause," and which required the lessee to level the land demised at the expiration of the term.

The Plaintiff alleged, that he was, at the date of the agreement, seised in fee simple in possession of the land mentioned in the first clause, subject to a mortgage; and it was thought desirable that a transfer of this mortgage should be effected previously to the completion of the agreement; that he proceeded to endeavour to effect such transfer, and that he was, in other respects, occupied in placing himself in a position to carry the said agreement into effect, when, on the 10th *December*, 1855, he received the following notice from the Defendant:—

"I hereby require you to perform and complete, within one calendar month from the day of the date hereof, your part of the agreement in writing entered into by you with me, bearing date the 4th of *October* last, and signed by you; and I hereby offer to perform my part of the said agreement within the time aforesaid, on your performing your part thereof. And I hereby give you notice, that, in default of your performing your part of the said agreement within the period aforesaid, I shall consider the said agreement at an end."

On the receipt of this notice, the Plaintiff's solicitors, by his direction, applied to Mr. *Strongitharm* for the abstract of his title to the field which the Plaintiff had agreed

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Mr. *Strongitharm*, and to grant certain covenants were
 Mr. *Weekes*.

"3rd. Mr. *Macbryde* filed his notice of rescission on the 8th January, 1856, whereupon the Plaintiff's solicitors prepared the draft of a lease of the land, now held by him, and on the 7th they forwarded it to Mr. *Neville*.

"4th. Mr. *Palmer*, the solicitor of Mr. *Strongitharm*, and Mr. *Weekes* the Plaintiff's solicitors also prepared the assignment to the Defendant of the brick-kilns purchased by Mr. *Neville*, and also the draft of a conveyance of the Defendant of all the land to which the Plaintiff related, including the field purchased by the Plaintiff of Mr. *Strongitharm*. On the 9th *January*, 1856, they forwarded the last-mentioned drafts to the Defendant's solicitors.

The Defendant's solicitors retained these drafts, but on the 12th *January*, sent the following letter to the Plaintiff's solicitors :—

"Dear Sirs,—Mr. *Macbryde*, not having performed his part of the agreement between himself and Mr. *Weekes* of the 4th *October* last, within the time specified by the notice, served by the latter on the former on the 10th *December* last, on behalf of our client, we rescind the contract, and beg to return draft lease and assignment."

On the 14th *January*, the Plaintiff's solicitors wrote to the Defendant's solicitors denying their right to rescind the contract.

Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiff. The Defendant had no right to rescind the contract upon a month's notice. The performance of the agreement depended partly on the acts of two other persons, Mr. *Strongitharm* and Mr. *Neville*.

Sharm and Mr. *Neville*, neither of whom
the agreement. The Plaintiff used due
ble him to perform the contract, in
as unable to complete those acts
limited by the notice. If the
s, instead of retaining the drafts
in, had returned them immediately, the
ight have executed a lease and tendered it to
Defendant within that time. At all events one
month was not a reasonable time. They cited *Withy v. Cottle*(a); *Seton v. Slade*(b); *Doloret v. Rothschild*(c); *Parker v. Frith*(d).

Mr. *Follett* and Mr. *Southgate*, for the Defendant.
The subject of the purchase was a lease, for a limited
term, of a working colliery, and therefore immediate
possession was of the essence of the contract. The
Defendant had a right to fix a reasonable time within
which the Plaintiff should complete, and in default to
rescind the contract; and here the time given by the
notice to complete and put the Defendant into legal
possession was ample. The Plaintiff not having com-
plied with the requisitions of that notice, the contract
was at an end. They relied on *Viscount Clermont v. Tasburgh*(e); *Norway v. Rowe*(f); *Southcomb v. Bishop of Exeter*(g); *Parkin v. Thorold*(h); *Benson v. Lamb*(i), and *King v. Wilson*(k).

Mr. *Karslake*, in reply, referred to *Guest v. Hom-
fray*(l).

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| (a) <i>Turn. & Russ.</i> 78. | (g) 6 <i>Hare</i> , 213. |
| (b) 7 <i>Ves.</i> 265. | (h) 2 <i>Sim. N. S.</i> 1. |
| (c) 1 <i>Sim. & St.</i> 590. | (i) 9 <i>Beav.</i> 502. |
| (d) 1 <i>Sim. & St.</i> 199, n. | (k) 6 <i>Beav.</i> 124. |
| (e) 1 <i>Ja. & W.</i> 112. | (l) 5 <i>Ves.</i> 818. |
| (f) 19 <i>Ves.</i> 144. | |

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The MASTER of the ROLLS.

This is a suit for specific performance.

The defence is two-fold. First, it is said that the Plaintiff made inaccurate representations as to the value of the mine, and on the faith of which the Defendant entered into the contract; and, secondly, the Defendant says, that he has determined the contract by a notice given on the 10th of *December*, 1855, stating that unless the Plaintiff performed his part of the contract within a month from that period, it was to be put an end to, and which he asserts was done.

On the first part of this case, I expressed my opinion at the hearing, that it failed, for, assuming the misrepresentations to have been made, as the Defendant alleges, still after he had full information respecting that representation and the value, he gave the notice in question, in which he has undertaken to perform his part of the contract, in case the Plaintiff performed his part within a month after notice. This, in my opinion, is conclusive evidence that he did not, at that time, consider the misrepresentation to be material, and that, notwithstanding it, he was willing to perform his part of the contract. After this, it appears to me to be impossible for the Defendant to say, that the misrepresentations, which he was then aware of, were so serious, that it would be inequitable to compel him to perform his part of the contract. His notice pronounces judgment on his own objection, and in fact declares it to be untenable.

The other objection on which I reserved my judgment depends upon the question of time,—whether, in the circumstances of this case, the notice of the 10th of *December*, 1855, was a reasonable one for the Defendant

ant to give; and if so, whether it has been complied with by the Plaintiff or has been subsequently waived by the Defendant. The contract was dated the 4th of October, 1855. [*The Master of the Rolls here read it.*] It is in favour of the Plaintiff, that no time is mentioned for the completion of the contract; and also, that it imposes upon him several matters to be accomplished, which, in the ordinary affairs of mankind, take time, and the completion of which did not depend upon himself alone. It must be assumed that it was contemplated between the parties, that the Plaintiff was to have a reasonable time to enable him to accomplish these objects. On the other hand, on the side of the Defendant, it is to be observed, that the subject-matter of the contract was a lease for working mines, and, above all, that more than half the land intended to be worked was held under a lease for less than twenty-one years, which was to be assigned, and which was rapidly running out. The absence from the contract of any specific mention of time within which it was to be completed, which would probably be conclusive against the Defendant at law, I consider unimportant in equity. This, in my opinion, is one of those cases, in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent, that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the Defendant might decline having anything further to do with the matter. The subject of the contract was in part a lease for working a mine; which is a trade of a fluctuating character, and obviously coming within the principles laid down in the cases cited of *Parker v. Frith* (a); *Wright v. Howard* (b); *Coslake v. Till*

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(a) 1 Sim. & S. 199, n. (b) 1 Sim. & S. 190.

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v. *Till* (*a*); and *Walker v. Jeffreys* (*b*); and several other cases. The rest of the property contracted for was not merely for the same purpose, but was a leasehold having a short period to run, and therefore, from day to day, rapidly decreasing in value. In such a case, it is incumbent upon the vendor to use his utmost diligence to complete his part of the contract, although no time is specified in the contract; and in equity, the purchaser is at liberty to fix a time for the completion of the contract, by giving reasonable notice for that purpose. No doubt this would have no operation at law; the difference being very marked between law and equity, so far as regards this question; law only considering time as of the essence of the contract, when it is expressly specified, whatever may be the condition of the parties and the property, but equity considering time essential in those cases only, in which injury would be inflicted upon one party by disregarding it.

With respect to that part of the contract which contemplates the Plaintiff purchasing the adjoining field, and obtaining the consent of Mr. *Neville* to the assignment of the twelve acres, it is true, as I have observed, that a reasonable time is to be allowed to the Plaintiff to effect these objects: but the time that is to be allowed, for this purpose, is to be taken with this qualification:—that the Plaintiff, by entering into the contract, not only positively affirms that he can accomplish these objects, but he impliedly affirms, that he will be able to accomplish them speedily; and he cannot, in my opinion, afterwards be allowed to urge, as a sufficient excuse for a considerable delay, the fact that it was two or three months before he could induce the owner to sell the field in question, or that the purchase and the investigation of the vendor's title occupied several months.

For

(*a*) 1 *Russ.* 376.(*b*) 1 *Hare*, 341.

For the same reason, he cannot, in my opinion, urge as an excuse, that a considerable time elapsed before he could induce Mr. *Neville* to agree to the terms upon which the lease should be assigned. Although he might, in this case, be permitted to shew, that unexpected obstacles occurred, and that he had used the utmost diligence to surmount them; many cases, of which *Gee v. Pearse*(a) is an instance, affirm this principle:—that the vendor must be taken to have the means of completing his part of the contract when he entered into it: in my opinion, the present contract is no exception to that rule, although it is a very peculiar one, and one of which, from its nature, it would have been almost impossible for the Defendant to have enforced the specific performance against the Plaintiff.

This then was the state of the parties when the contract was entered into: the subject-matter of it was such, that it was of the greatest importance that it should be completed forthwith, and that the Defendant should be put into possession of the subject of it without any delay; the Plaintiff was under the obligation to use every species of exertion to accomplish this end, and if he could not do so within reasonable time, on being apprised of that fact, the Defendant might abandon the contract.

In this state of things, I have looked at the evidence to see what has been done by the Plaintiff, having regard to that, which, as I have already stated, he was bound to do. The contract was on the 4th *October*, 1855. On the 5th *November*, the Plaintiff entered into an agreement with the owner of the adjoining field to purchase it for 560*l.* No explanation is given why this contract

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(a) 2 *De G. & Sm.* 325.

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contract was not sooner made, and a month had then already elapsed. Up to the time when the notice was given by the Defendant, I do not find that any further steps had been taken by the Plaintiff relative to this property. It would appear, that no time for the completion of the contract was fixed; that the abstract was not delivered, and was not even applied for until the notice of the 10th of *December*. No communication whatever appears to have been made to the Defendant or his solicitors, on the subject of the lease of the piece of land of which the Plaintiff was the owner under the contract.

With respect to the assignment of the lease from Mr. *Neville*, the delay, up to this time, appears to have been much the same as in the case of the purchase from Mr. *Strongitharm*. It does not appear when Mr. *Neville* was first applied to for his consent to the assignment of the lease: at all events, his consent was not obtained until the 12th *November*, 1855, on which occasion the Defendant was present. Nothing further was done on the subject, and the correspondence shews, that the Defendant, if he did not strongly press, at least suggested to the Plaintiff, the necessity of speedily settling the matter, and urged that, at all events, the lease from Mr. *Neville* might be assigned, if the rest of the matter stood over.

In this state of things, more than nine weeks having elapsed since the contract, and no communication having been made to the Defendant, to shew when it was likely that it would be completed, he gave the notice on the 10th *December*, in which he says, if not completed within a month, "he should consider the agreement at an end."

What

What constitutes a reasonable notice, and a reasonable time to be fixed in it, must depend upon the contract and the circumstances of each case. I think in those of the present case, having regard to the subject-matter of the contract, to the fact that more than two months had already elapsed, and that nothing appears to have been completed, so far as the Defendant was concerned, no abstract of title delivered, no communication made or information given which looked like advancement (except that he was present on the 12th *November*, and knew that Mr. *Neville* had consented to the assignment of the lease), I think, under all these circumstances, that the Defendant was justified in giving the notice in question, and that a month was not an unreasonable time to be fixed for this purpose.

*Parker v. Frith* (a) was, in my opinion, a very different case. There, there was nothing in the subject-matter of the contract which required despatch. The time originally limited in the contract had been mutually abandoned: the vendor had shewn no want of diligence in making out his title, and in doing so, he met with an unexpected obstacle in the withholding of a deed, which he used his best exertions to obtain as speedily as possible. In that case also, on receiving the notice, the vendor disputed the right of the purchaser to give it, and insisted throughout on the contract. Here, on the contrary, when the notice was received, no objection seems to have been taken, either to the right of the Defendant to give it or to the time specified. This, it is true, does not vary the rights of the parties, but as far as it goes, it shews that the Plaintiff took the same view of the construction of the contract he had entered into, which I have expressed. What I have already stated

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(a) 1 *Sim. & Stu.* 199, note.

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stated of this case, shews also how marked the difference is between it and *Parker v. Frith* (a) in other respects. That case was never meant to decide, that the parties to a contract are not bound to use due diligence for its completion, but it merely decides, that the fact, that a time was specified in the contract within which it was to be completed, does not necessarily, in equity, as it does at law, make time of the essence of the contract. Upon the facts in evidence of that case, the want of due diligence could not, in my opinion, be imputed to the vendor; the facts in evidence in this case lead me to a contrary conclusion as regards the Plaintiff.

Having come to the conclusion, that the Defendant was justified in giving the notice of the 10th *December*, the next question is, has the Plaintiff complied with the requisition contained in that notice? In my opinion he has not. All that he did was, the day before the month expired, to send the Defendant's solicitor a draft of the lease of two plots of ground, and also of the proposed assignment of the lease from Mr. *Neville*. It is true, that the Plaintiff had, in the meantime, satisfied himself that Mr. *Strongitharm* could make out a good title to the field contracted to be sold by him on the 5th of *November*; but I can discover no trace of the Defendant knowing anything about this, and so far as he is concerned, and for aught he knew, such drafts were of no more value or significance than if they had been delivered the day after the contract had been made in *October*, 1855. There does not appear to have been a tittle of evidence laid before the Defendant or his solicitors to shew that the Plaintiff had any power or right to grant either the lease of his own field or of that bought from Mr. *Strongitharm*, or that Mr. *Neville* had

(a) 1 Sim. & Sta. 199, note.

had any authority to grant the lease which he consented to the assignment of. If, therefore, the Defendant was entitled to have a good title shewn to grant this lease, no step was taken for that purpose before the month had expired, nor up to the time of the filing of the bill.

It is true, that after the filing the bill, it would have been a useless expense to have adopted any such course, and it was incumbent upon the Plaintiff to file his bill forthwith, which he did; but nevertheless, the making out the title is a matter which still remains to be done if the contract is to be enforced, and if the Plaintiff now obtained a decree, many months might still elapse before the Defendant could obtain a lease, with a reasonable security that he could hold it, and during that time, the state of the coal trade might materially alter, and, what is of more importance, the lease to be assigned would be continually diminishing in value.

The next question is, was the Defendant entitled to require the Plaintiff to make out a title to the lease in question? As a general proposition of law, in the absence of contract or waiver, this is not and cannot be disputed. The contract is silent on the subject, no waiver is alleged, the acceptance of the title is not suggested, but it is said, it was the duty of the Defendant to ask for the abstract; and not having done so, it must be imputed to the Defendant as laches, that he failed to do so. But the case which was cited for this purpose falls very far short of establishing such a proposition. Each case may be varied by its circumstances, and if there were a case in which the Defendant might be excused from such a rule, it would, in my opinion, be one, where, from the date of the contract and from the terms of it, it appeared

that

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that the vendor had not the means of delivering the abstract at that moment, but must wait for the completion of the arrangements with Mr. *Strongitharm* and Mr. *Neville* before he could do so; and where also the Defendant might reasonably suppose, that the purchaser was waiting till he could deliver an abstract of the title relating to the whole together.

The conclusion, therefore, to which I have come, upon the whole case, is, that the nature of the subject-matter of the contract, and the circumstances which affected the case prior to the 10th *December*, 1855, justified the Defendant in giving the notice on that day, that the Plaintiff having, at the expiration of that notice, failed in shewing that he had complied with his part of the contract, or that he was in a situation to complete it, and the Defendant never having waived the notice, the Plaintiff is not entitled to the assistance of this Court for the specific performance of the contract, and, consequently, the bill must be dismissed, and with costs.

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*June 20, 21,**23.**July 22.*WATERS *v.* THORN.

THIS suit was instituted for setting aside a purchase by a solicitor from his client, and which the client had confirmed by her will.

A solicitor purchased a property from his client, who, by a codicil, confirmed the sale and devised the property to the solicitor. The Court, having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity.

Little reliance is to be placed on the evidence of surveyors in a contest as to value.

In 1842, Mrs. *Church*, a widow of the age of about seventy, possessed a freehold house in *High street, Winchester*, which was let to a tenant from year to year at a rent of 32*l.* The property was out of repair, the tenant was one year in arrear, and she had some difficulty in collecting the rent. She, in consequence, proposed to sell the house to Mr. *Bowker* (a solicitor, who had acted professionally for her), in consideration of a life annuity. A valuation having been made by an Actuary, on the assumption that the house was worth a clear sum of 20*l.* a year, Mr. *Bowker* afterwards agreed to purchase the property for an annuity of 65*l.* during Mrs. *Church's* life.

Accordingly, in *August*, 1842, Mrs. *Church* conveyed the house to Mr. *Bowker*, and he, on the other hand, executed a bond for securing her an annuity of 65*l.* during her life. Immediately after the purchase, Mr. *Bowker* got rid of the old tenant, and took his furniture and fixtures in discharge of the arrears of rent. He then laid out 100*l.* in putting the house in repair, and obtained a solvent tenant at a rent of 35*l.* a year, payable quarterly and in advance.

Mrs. *Church* executed her will on the 28th of November, 1842, by which she devised her property, including

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cluding this house by name, to her nephews and neices (the Plaintiffs), and she made Mr. *Bowker* and Mr. *Thorn* her executors. On the same day she executed a codicil, prepared by Mr. *Bowker*, which was in these words :—“ I, *Sarah Church*, having sold the freehold house and premises situate in the *High street, Winchester*, to *Frederick Bowker*, in my will named, do hereby make this a codicil to my before-written will, and hereby confirm such sale, and give the said freehold premises to the said *Frederick Bowker* and his heirs forever, &c.”

She made two subsequent codicils on the 24th of *August*, 1844, and the 15th of *June*, 1845, by which she confirmed her will and the first codicil.

Mrs. *Church* died in *February*, 1846. In *August*, 1846, a settlement of accounts of the real and personal estate (exclusive of the house) was come to between the Plaintiffs, her legatees, and the executors, and releases were then executed.

On the 13th of *September*, 1854, the legatees filed this bill, praying that the purchase to Mr. *Bowker* might be set aside, and for an account of the real and personal estate of the testatrix.

Mr. *Bowker*, by his answer, stated as follows :—“ In *August*, 1842, the testatrix stated to me, that she should sell her house,” &c., “ and she then expressed a wish that I should purchase them, and pay for them by way of annuity, saying, ‘ she had no partiality for her relations, and that they merely went to her for what they could get.’ I, at that time, declined to make the purchase, saying to the testatrix, as the fact was, ‘ I was not in a situation to purchase the property.’ On several subsequent

sequent occasions, the subject of the purchase of the property by me was broached by the testatrix, and on one occasion, when I waited upon her respecting her will, she again expressed a wish that I would purchase the house in the *High* street, and pay her for the same by way of annuity. I then stated to the testatrix, ‘that I was not aware what would be a fair annuity to be allowed to her for the said house, but I would take the opinion of an Actuary what was a fair annuity.’ At this time, the house was in a very dilapidated state, and was badly tenanted. It was then let for about 25*l.* per annum, and was worth about 400*l.*, certainly not more. But little or no rent had been paid for years, the said testatrix and her husband having had bad and troublesome tenants. I considered the house and premises to be worth 20*l.* per annum. I shortly afterwards consulted Mr. *J. Ventham*, an Actuary, as to the value of the said premises.”

Mr. *Ventham* proved his valuation of the property, and verified his calculations, and stated that he “considered the result fair and reasonable, and still so considered them.”

Mr. *Bowker* produced ten or twelve respectable Surveyors, who swore that the property was not now worth more than from 450*l.* to 500*l.*, and that, in 1842, it was not worth more than from 350*l.* to 400*l.* Evidence was also adduced by him to shew, that 400*l.* would not purchase a greater annuity than 60*l.* per annum, for a female life of the age of seventy years.

The cause now came on for hearing.

Mr. *Follett* and Mr. *W. Morris*, for the Plaintiffs. This transaction cannot be supported; it was a purchase

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chase by a solicitor from his client, without the intervention of any other professional person to protect this old lady. The purchaser is, therefore, bound to shew that he gave the full value ; he has not only failed in doing so, but the effect of the evidence is, that he purchased the property at an under value. He has paid only 195*l.* for property which he himself values at 400*l.*, and he gave a mere personal security for the annuity, which might have turned out of no value whatever. "He proposes a bond as a security for her daily bread. Is that what a court of justice can approve?" *Gibson v. Jeyes* (*a*).

As to the codicil, it is merely a part of the void transaction, it is of no effect in equity, and the Defendant is a trustee for the parties interested in the testatrix's property. The settlement of account and release are no bar to the relief prayed, and time does not run as between trustee and *cestui que trust*; *Trevlyan v. Charter* (*b*).

They also cited *Holman v. Loynes* (*c*) ; *Savery v. King* (*d*).

*Mr. Roupell* and *Mr. C. Barber*, *contrà*. There was a total absence of fraud on the part of the Defendant *Bowker*. The testatrix was perfectly cognizant of the value of the premises sold, and the proposal to sell the same originated with her, and was several times repeated. The evidence shews, that the full value was given for the property, and it matters not what security was given, for the annuity was duly paid down to the annuitant's death.

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| ( <i>a</i> ) 6 <i>Vesey</i> , 278.                                                 | ( <i>c</i> ) 4 <i>Dc G., M. &amp; G.</i> 270. |
| ( <i>b</i> ) 4 <i>L. J., N. S.</i> , Ch. 209,<br>and 11 <i>Cl. &amp; Fin.</i> 714. | ( <i>d</i> ) 5 <i>H. Lords Ca.</i> 627.       |

The relation of solicitor and client did not exist at the time of this purchase.

Thirdly. If the contract be voidable, still the devise remains untouched, and Mr. *Bowker* is as much an object of the testatrix's bounty as the Plaintiffs. The case is governed by *Stump v. Gaby* (*a*) ; and a solicitor may take a bequest, notwithstanding he prepared the will; *Hindson v. Weatherill* (*b*). The Plaintiffs themselves must give full effect to the will; they cannot claim under and against it.

Fourthly. The Plaintiffs are bound by the settlement of accounts and the release. Here the fact of the purchase appeared on the will itself, and the case is not like *Trevelyn v. Charter*, where there was, for a long period, an ignorance of rights.

Lastly. The Plaintiffs are barred by lapse of time, for the bill was not filed until twelve years after the transaction.

Mr. *Follett*, in reply.

*The Master of the Rolls* reserved judgment.

*The Master of the Rolls.*

July 22.

This is a suit to set aside a transaction which occurred in the close of the year 1842, by which *Sarah Church*, the testatrix, conveyed to the Defendant, Mr. *Bowker*, a freehold house in the *High street*, in *Winchester*, for an annuity of 65*l.* per annum.

This

(*a*) 2 *De G., M. & G.* 623.

(*b*) 5 *De G., M. & G.* 301, and 1 *Smale & Gif.* 604.

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This sale is impeached on the ground, that Mr. *Bowker* was the solicitor of the testatrix at the time, and that the sale was improper, both on account of the inadequacy of the value, and the mode in which the annuity was secured.

The Defendant denies the impropriety of the sale, or the inadequacy of the value, and besides this, he alleges, that whether the value was inadequate or not, the testatrix, as a matter of bounty, determined to prevent this very question being raised after her decease, and, by a codicil to her will, she expressly ratified and confirmed the sale in question, and left the premises to Mr. *Bowker*, for his own use and benefit. I think it necessary to consider these two matters separately, and I shall therefore consider, first, the case of the sale without reference to the will and codicil of the testatrix, and I shall then consider what effect the testamentary disposition of the testatrix produces on the case.

It was suggested, in the argument, that Mr. *Bowker* could hardly be called her solicitor, and that, in fact, she had none, and required none; but this argument cannot be maintained. The greater or less occasion which a client may have for the services of a solicitor does not affect the question; the only question, apart from the exercise of undue influence, is this:—did the relation exist at the time of the transaction? That the relation existed here is certain. On the death of her husband, the testatrix consulted Mr. *Bowker* as her solicitor; she employed him to prepare her will; she consulted him relative to this very property, and she consulted no other person. All the consequences, therefore, that flow from the relation of solicitor and client exist in the present case. These are thus expressed by Lord *Eldon* in

in *Gibson v. Jeyes* (a) :—"An attorney buying from his client can never support it, unless he can prove, that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule;" and the burthen of proving this lies on the solicitor. This, therefore, is the test by which this transaction on the first part of the case is to be examined.

It is stated, in the evidence for Mr. *Bowker*, which I assume to be true, that the first suggestion of selling the property for an annuity sprang from herself, and that this arose from the difficulty of obtaining payment of the rent from the tenant, who, it appears from the evidence, was in arrear for about one year's rent. The house was a freehold house in the *High street* of *Winchester*, which I understand to be a principal street, and an eligible situation in that city. The house was old and out of repair, and it was occupied by a person of the name of *Dawkins*, at a rent of 32*l.* from year to year. The fee simple of this was sold for an annuity of 65*l.* per annum, for the life of the testatrix. Her exact age is not proved, but three years and three months afterwards, viz., in *February*, 1846, she died, and her age at that time was stated to be seventy-three by *Jane Chowne*, who gave that age to the registrar in *Winchester*, from information which she had obtained from the testatrix herself. By seventy three, I understand that her last birth-day was seventy-three, and that she was then in the seventy-fourth year of her age. The day of her birth is nowhere stated, it may therefore be fairly assumed, that she was about seventy at the time of this transaction.

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(a) 6 *Ves.* 271.

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If the case rested on the answer of the Defendant *Bowker*, and the evidence of Mr. *Ventham*, the Actuary, whom the Defendant consulted in 1842, prior to the sale, it would, in my opinion, be conclusive against the validity of the transaction.

The account given by the Defendant, and by Mr. *Ventham* is this :—[*His Honor read them.*] Though the house was let for 32*l.* per annum, Mr. *Bowker* valued it at 20*l.* per annum net, and in his answer states, “that it was then let at about 25*l.* per annum,” and deducting about 5*l.* per annum for the repairs and outgoings, which appears to me to be a fair deduction, would reduce it to 20*l.* per annum. Mr. *Ventham* values it at 21*l.* 15*s.*; in this valuation he deducts 2*l.* 8*s.* usual repairs annually, 5*l.* 5*s.* for the interest of money necessary to be laid out in putting the house into repair; insurance and outgoings, 2*l.* 12*s.* The result which immediately followed shewed, as might be supposed, that this valuation was inaccurate, for a hundred pounds laid out on the premises immediately produced a tenant willing to give 35*l.* per annum, paying the rent in advance, paying all the rates and outgoings, keeping all the interior part of the house in repair, and leaving the landlord nothing to do, but to paint the exterior wood-work in every four years at least. No account of what the house has actually produced since is in evidence, but from what is in evidence, I should infer, that it has produced on an average 30*l.* per annum to the landlord, clear of all deductions. The valuation of the annuity was on the principle that the house was worth only 20*l.* per annum, and this appears to me to have been below the real value.

There are many other circumstances, in this question of value, which are material to be noticed. It is to be observed,

observed, that the testatrix did not want any increase to her income, for the whole excess occasioned by this sale seems to have been saved by her, and therefore, the only motive for selling the property for an annuity was, the difficulty of obtaining payment of the rent; but upon the evidence before me, there is nothing to shew that the rent might not easily have been obtained. It is sworn that *Dawkins* was a year in arrear, but he does not seem to have been the only person liable for the rent. He is called by Mr. *Bowker*, in his answer, "the occupying tenant," but in the deed of conveyance, his name is not mentioned, and the house is said to be, at that time, in the occupation of *John Aslett*, or his under-tenant. I infer, therefore, that *John Aslett* was also liable to the testatrix for the rent, but no application appears to have been made to him to pay any rent, nor is there any evidence that he was unable to do so. In the next place, it is established, that there was no difficulty in getting rid of the tenant *Dawkins*, and apparently none in taking his furniture and fixtures in discharge for the arrears of his rent. In the third place, the testatrix would have had no difficulty in obtaining a new tenant, and in finding 100*l.* to put the premises in repair (assuming this to have been necessary for the purpose of obtaining such new tenant), as she had money in the funds far exceeding the amount required, and which she might have applied for this purpose. In the fourth place, the Defendant experienced no difficulty in finding a tenant, perfectly able and willing to give 35*l.* per annum, and one who consented that this rent should be paid quarterly and in advance. Now, no payment was to be made for the first quarter of the annuity. In reality, therefore, the annuity did not begin to run till 25th *March*, 1843, which was the date of the lease, and the annuity was not paid in advance; so that, at Midsummer, 1843,

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Mr. *Bowker* would have received 17*l.* 10*s.* in respect of half-yearly rent, and would have had to pay only 16*l.* 5*s.*, one quarter of the annuity. Consequently, if the arrangement made for Mr. *Bowker* had been made for Mrs. *Church*, she would, if she had laid out 100*l.*, which, as I have remarked, she could easily have accomplished, have thereby obtained a larger amount of income, for three-quarters of a year from *November*, 1842, than she actually received, and she would have obtained a responsible tenant, with a rent sufficiently increased to pay her three per cent. on her outlay, being nearly the same amount of interest as she would have received if she had left the money in the funds.

On the mere question of value, therefore, on this evidence, I should have come to the conclusion, that the price was inadequate, and not such as by itself could sustain a sale from a client to his solicitor. But there is other evidence of an important character, and which must be noticed.

Mr. *Bowker* has produced ten or twelve respectable Surveyors, who swear that the property is not now worth more than from 450*l.* to 500*l.*, and that in 1842, it was not worth more than from 350*l.* to 400*l.*; and evidence is adduced to shew, that 400*l.* would not purchase a greater annuity than 60*l.* per annum, for a woman of the age of seventy years.

I have frequently had to comment upon the unsatisfactory nature of the evidence of value given by surveyors. Men of equal knowledge and respectability are constantly found giving very contradictory evidence on this subject, and always more or less favourable to the side on whose behalf they are adduced. This, probably, is inevitable, but the conclusion to which I have been

been compelled to come is, that in all these cases, I place very little reliance on the evidence of surveyors, who know beforehand on which side their evidence is intended or desired to be used. It is true, that in the present case, the Plaintiffs have produced not one competent witness to give evidence of an opposite character, and it is open, therefore, to the observation, that they are unable to do so. Judging, however, from my experience in these matter, in cases before me while at the Bar and since, I do not attach much importance to this omission. When I come to examine the evidence of these witnesses, I am at a loss, accurately, to understand why a freehold house, situated in the *High street* of *Winchester* (apparently a highly eligible situation) should, although an old house, be worth no more than from thirteen to fourteen and a half or fifteen years' purchase. No explanation is given, why this house, which appears to have produced 35*l.* per annum regularly for the last twelve or thirteen years, and likely to do so in future, is such, that no one could now be induced to give above 500*l.* for it, or more than 400*l.* in 1842, when it was let for 32*l.* per annum. The test to which this Court looks with the greatest confidence, viz., the price actually bid at a sale by auction, or the offer of a person *bonâ fide* desirous to become a purchaser by private contract, is wanting in this case.

It is a matter of no slight moment, that Mr. *Bowker* does not appear to have offered the house to any one in *Winchester* when Mrs. *Church* desired to sell it. He expresses the reluctance with which he became the purchaser, but he does not appear to have endeavoured to obtain another purchaser, or a better price from any one else, or to have made it known generally, in *Winchester*, that the house could be bought for a sum of money, or for an annuity on the life of this old lady. If he had

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done so, and if after this had been generally known, no one had offered a sum exceeding 400*l.*, or an annuity of 65*l.* per annum, the case, on the question of value, would have stood in a very different position from that in which it now comes before me. The question of value, however, is not the only matter to be regarded in this transaction. The purchase-money, viz., the regular payment of the annuity, was secured simply by the personal security of the purchaser. This appears to me to be a serious objection to the validity of this transaction. In fact, this matter has rather been passed over by the counsel for the Defendant than answered. It is said, that the annuity was regularly paid to the testatrix until her death, and that, therefore, no question arises on it; but I am not to judge of the propriety of the transaction by the event. If I were, I could not resist the argument of the Plaintiff's counsel, who called on me to notice, that three years' annuity only was paid, and that, consequently, the house was in reality bought for 195*l.* To this, the conclusive answer is given by the Defendant, that she might have lived for twenty or twenty-five years, and that the transaction cannot be judged of by the result which has happened, of her living a greater or smaller number of years. I concur in that observation, but I think it equally applicable to the mode in which this annuity, the purchase-money for the property, was secured. The fact that the Defendant has, during the three years of Mrs. *Church*'s life, been able to pay and has paid the annuity to her, does not alter the view I must take of the transaction, which I must regard, as to this point, exactly as if Mrs. *Church* were herself seeking to set aside this sale, immediately after the deed had been executed by her. In that view of the case, I am convinced, upon the evidence before me, that the burthen of proof, which is thrown upon the

the Defendant, is not satisfied, and that the transaction cannot stand as a sale.

This brings me to the consideration of the second branch of this subject, viz., whether, having regard to the codicil of the 28th November, 1842, this house is not vested in the Defendant as devisee of Mrs. *Church*. The codicil is in these words—[*His Honor read it, ante*, p. 548.]

This, it is alleged, is exactly analogous to the case of *Stump v. Gaby (a)*, and it is, no doubt, true, that if the testatrix has devised this house to the Defendant, for his own use and benefit, no question arises. If, out of motives of bounty towards him, she has devised to him the benefit of this contract, it cannot now be impeached. But I am unable to discover her intention to do either in these testamentary instruments.

By her will, bearing date the same day as the codicil, she devised this house to her relations. The evidence of Mr. *Bowker*, and that given on his behalf, establishes, that the testatrix thought that the price given by Mr. *Bowker* was the highest price that could be obtained; nay, that it was more than she expected. What benefit or bounty to Mr. *Bowker* could there be under such circumstances to confirm the sale? To make the case of *Stump v. Gaby* apply, it ought to appear, that she knew that the case was one which could be successfully contested by her, and that so knowing, she had resolved to give the property to Mr. *Bowker*, and to confirm the sale. Not only was she ignorant of this, but, if the evidence of Mr. *Bowker* and his clerks is to be relied upon, she believed the very opposite. In that view of

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(a) 2 *De G., M. & G.* 623.

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the case, I think that it rather injures than assists the case of Mr. *Bowker*, because this excludes the intention of bounty, and if not intended as an act of bounty to him, why was it made, and at whose instance and request? The only answer which can be given to these questions would seem to be this:—that it was at the suggestion of Mr. *Bowker* himself, in order to avoid the question which has arisen in this suit, the probability of which may have occurred to him, but the possibility of which does not appear to have been present, or to have been suggested, to the mind of the testatrix.

The codicil, no doubt, operates to give the legal estate to Mr. *Bowker*, but, in my opinion, the effect and construction of the codicil is only to give him that estate for the purpose of the sale, assuming the sale to be a valid and legal one, and it does not give him any beneficial interest in the premises, if ever the sale should be set aside, on the ground of being one which, as between solicitor and client, could not be supported.

My opinion, on the whole of this case, is, that the sale must be declared to be void, and the deed cancelled. It must be declared, that under the codicil, Mr. *Bowker* is to be considered as a trustee for the persons entitled under the will of the testatrix.

There must be an account of the rents and profits of the house, on one side, making all just allowances for repairs and outgoings, and, on the other, an account of the payments made in respect of the annuity, and the balance must be paid by Mr. *Bowker*, and there must either be a reconveyance or a sale of the trust premises, for the purposes of distribution amongst the persons entitled.

So

So far as the bill seeks a general administration of the estate of the testatrix, it must be dismissed with costs. The transaction in *August*, 1846, was, in my opinion, a complete settlement of the accounts of the estate of the testatrix, and although the *cestuis que trust* were ignorant and illiterate persons, the evidence satisfies me, that they knew perfectly well what they were about when they executed the release, and if they did not themselves understand the accounts, they could have had them examined by some one on their behalf, which they did not think fit to require, and eight years afterwards, when the executors may have lost or destroyed their vouchers as useless, they cannot be at liberty to open all the accounts again. But so far as regards the sale, the case is, in my opinion, different; the validity of the sale was not in question or discussed between these parties on that occasion, nor was the deed of release and indemnity intended to affect or ratify that transaction, which, if it does at all, does it only incidentally and collaterally, as part of the testatrix's assets. I am of opinion, therefore, that it ought not to prevent my making the decree I have already stated relative to the house in question. The lapse of time is material also on this subject, but observing the humble situation of life in which the Plaintiffs move, their constant applications on this subject, and the difficulty they might naturally have in obtaining the service of a solicitor to institute proceedings for them, of which there is some indication in the evidence before me, I am of opinion, that I ought not to allow it to bar their right to a decree, if, on other grounds, I think them entitled to it.

The costs must also follow the event, so far as the suit relates to this subject, which I do with the more regret,

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regret, because I do not impute fraud, or the exercise of undue influence, to Mr. *Boucher* in this transaction; but I rest my decision on the ground that he has, inadvertently, involved himself in a transaction which throws on him the burthen of proving the correctness of it, which he has failed in doing.

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July 31.

August 1.

*A.*, seised of an advowson, of which his son *W. J.* was incumbent, devised it to trustees to sell on his son's death and divide the produce between his own nine children. Held, by the Master of the Rolls and afterwards by the Lord Chancellor and Lords Justices, that, on the death of *W. J.*, the right of presentation which then accrued and could not be legally sold, passed by the will, and did not descend to the heir. Held also, by the Master of the Rolls, that the

Court had authority to make a partition of an advowson, and would follow, by analogy, the rule as to coparceners, and give the right of presentation to the members by seniority; but the Lord Chancellor and Lord Justice Knight Bruce held, that the right to present was to be determined between the children by lot.

The Court can make a partition of an advowson.

## JOHNSTONE v. BABER.

THE testator, *Charles Johnstone*, was seised of the advowson of the rectory of *Culmington*, of which his son *William Johnstone* was the incumbent. By his will, dated 18 April, 1805, he devised his real and personal estate to trustees, upon trust to sell all and singular his said real estate (except his advowson of the rectory of *Culmington*, &c.), and after providing an annuity for his wife, upon trust to divide the clear residue between his children; and upon trust, that his trustees should, immediately after the decease of his son *William Johnstone*, absolutely sell the advowson of the rectory of *Culmington*, &c., and divide the produce between the children of his son *William*, who should be living, if any, at the time of his decease, and in default, between the testator's nine children. The testator died in 1805.

*William Johnstone* continued the incumbent of the living of *Culmington* until his death on the 9th April, 1856. He had no child, and died without having disposed



posed of any right he might have had, as the eldest son and heir at law of the testator, to nominate to the next presentation of the rectory of *Culmington*.

*Charles P. Johnstone*, the brother of *William*, was now his heir at law, and was also the heir at law of the testator; and there were seven other children of the testator living. A Petition was now presented by four of the parties entitled to share in the proceeds of the sale of the advowson, alleging that they were advised that the right of presentation to the rectory passed by the will of the testator to, and was then vested in, *John Lloyd*, the surviving executor and devisee in trust of the will of the testator, for the benefit of the seven younger children of the testator, and praying that it might be so declared, and that the right to nominate the clerk to be presented to the said living was vested in the said seven younger children, and that the advowson might be sold with the usual consequential directions.

A Petition to obtain an immediate sale of the advowson had, in 1845, been presented, in the lifetime of *William Johnstone*, the incumbent, but the late Master of the Rolls considered he had no jurisdiction to make any order (a).

It was stated, as a fact, at the Bar, that the eldest surviving child of the testator was desirous of nominating a young life, whereby the produce of the sale of the advowson would be depreciated.

*Mr. R. Palmer* and *Mr. Osborne*, in support of the petition, contended that the Court had now jurisdiction to make the order prayed. That it was not the case of a devise to tenants in common, where, perhaps, the right to

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(a) 8 Beau. 233.

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to present would be in the eldest child, but a devise to trustees for sale, whose duty it was to proceed to such sale for the benefit of all parties interested. They relied on *Hawkins v. Chappel* (*a*), and particularly *Hill v. The Bishop of London* (*b*), which they argued was precisely in point. That it was quite clear the heir at law, *quæ* heir, had not the right of presentation, and that there could be no resulting trust for him; *Seymour v. Bennet* (*c*).

Mr. *Selwyn* and Mr. *Murray* for the heir at law. 1st. The testator was perfectly aware of the state of circumstances when he executed his will, and, by directing the sale after the death of his son, he intended the trustees to sell the advowson *minus* the first presentation, and that alone can now be sold. *Hawkins v. Chapple*, therefore, does not apply: there the trustees had postponed the sale of advowsons devised to them.

2ndly. The eldest of the *cestuis que trust*, who were *quasi* tenants in common, has a right to present. The case cannot be distinguished from "coparceners," the eldest of whom has clearly a right of presentation by common law. In the Second Institute it is said (*d*), "By the common law, if an advowson descended to divers coparceners, if they cannot agree to present, the eldest sister shall have the first turn, and the second the second turn, *et sic de ceteris*, every one in turn according to seniority," and equity will follow the law. The incumbent, the eldest son, might have resigned in his lifetime, and then presented; *Martin v. Martin* (*e*).

Mr.

- (*a*) 1 *Atk.* 621.
(*b*) 1 *Atk.* 618.
(*c*) 2 *Atk.* 482.

- (*d*) Chap. 5, p. 364; *Stat. Westm.* 2.
(*e*) 12 *Simp.* 579.

Mr. Schomberg referred to Sherrard v. Lord Harborough (a).

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Mr. R. W. Moore for trustees of a settlement.

Mr. R. Palmer in reply. The case of coparceners is not applicable; the tenure by them is peculiar and wholly different from a tenancy in common. The trustees were bound to convert as soon as they could; and tenants in common, in the present case, can no more take in succession than they can take together.

The Master of the Rolls considered there was no resulting trust for the heir, but said he would consider the other point.

The Master of the Rolls.

Aug. 1.

This is a case of very considerable interest, and I should have liked to have had further time to consider it; but this the necessity of an immediate decision precludes. I will state the opinion I have come to upon the subject. Upon referring to the text books, it will be found to be laid down, as a general rule, that coparceners, on whom an advowson descends, present according to seniority; and it is also laid down in the text books, that joint tenants and tenants in common do not; but that they must all concur, and that, unless they concur, the presentation is not good. There is no authority cited in any one of the cases for that proposition, and, singularly enough, in *Rolle's Abridgement*, and some of the Year Books, which are referred to on the subject, it appears, that it was the original state of the

(a) *Ambler*, 165.

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the law that coparceners were in the same situation, and *Rolle* in his Abridgement states (a), "Si 3 coparceners font partition a presenter per turne, et l'eigné usurpe en le turne del mulnes, ceo ne sera ascun usurpation sur le turne del puisné. 30 Ed. 3. 5." The next passage is this:—"Si 3 coparceners sont, et l'eigné present en son turne, sans partition, et puis un estranger usurpe en le turne del second, uncore ceo n'est ascun usurpation quant al 3^e ou primer coparcener, mes solement al second. 12 H. 7, Kell. 1, per Curiam." "4. Issint ust estre coment que partition ust estre fait a presenter per turn. 12 H. 7, Kell. 1." And then he refers to a great many cases in the Year Books, but I have not had sufficient time to consult them, although I have referred to some of them, which seem to shew, as far as I can make out, that it was upon this principle:—that the title was in all the coparceners, in all the joint tenants, and in all the tenants in common, and that, properly speaking, they could not present unless they all concurred; but that it was afterwards considered that they might make partition, and that if they make partition, in what way are they to make partition except by presenting separately?

Now this Court has held, that there may be partition almost of every thing; undoubtedly there may be a partition of a manor; you do not make two manors, but you divide the profits of it. I cannot accede to nor do I think it would be proper to follow, the mere *dictum* of Lord *Hardwicke*, who certainly does not appear to have decided it, that if the tenants in common cannot agree, it is then to be determined by lot, because what necessarily follows, if it be true, as laid down in those cases, that one tenant in common cannot present, it

(a) Tit. "Presentment, Usurpation (L. 2)," p. 373.

it is clear that the ordinary can refuse the clerk who is presented ; and accordingly, this would not give a right to one person chosen by lot, if the right be in all ; and it could not in the slightest degree improve the situation of the parties. But what I wish to consider is this :— here are two tenants in common of an advowson in fee who file a bill in this Court for a partition, and it would be contrary to all rule and principle to say, it cannot grant partition. If it can, then in what form does it give partition ? I apprehend, the only mode of granting partition is by giving a presentation to one in the first instance, and to another afterwards.

With respect to tenants in common and joint tenants, undoubtedly there is this distinction to be drawn between the two classes of cases. With regard to coparceners, as they are all of them either a series of daughters or sons of daughters, one of those daughters must have been older than the other, and therefore you have a sort of rule to go by. If it is given, as is usually the case, to children of the same family as tenants in common, you have the same rule to go by ; but if it is given to tenants in common or joint tenants of separate and distinct families, you have no such rule to guide you, and then the Court must deal with that as it can. It is singular that a good deal of discussion has taken place upon a case of this kind, which was one of considerable interest. In the Bishop of *Salisbury v. Philips*(a), it was held distinctly, that the ordinary had not a right to present, in case all the tenants in common agreed, but that the tenants in common might make partition between themselves, and might agree that they should present in succession ; and if they did, the ordinary could not refuse.

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(a) 1 *Lord Raym. Rep.* 535.

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There are several cases in the books, one between the Dean of *St. Paul's* and one of the Clerks of *Oxford*, who had an advowson in common, and they presented alternately, and the Court held, eventually, that a partition had been made in accordance with that rule. Now the cases shew, that partition may be made by the parties themselves, and that if the partition is made, then the ordinary cannot refuse to present; and that, consequently, if the tenants in common, in this case, should agree to say, we will present *seriatim*, in succession, then the ordinary could not refuse the clerk so presented, and would not require them all to concur, and say, "unless you concur I will refuse the Clerk who is presented."

Then, I repeat, if there were an advowson here, and if the parties filed a bill for partition, in what way is this Court to do it, unless by giving them a power of presenting *seriatim*? There is no other mode of doing it. It is true, in this case, there are nine tenants in common, and the result would be, that the ninth tenant in common would get the ninth right of presentation, which would undoubtedly be extremely remote, but I have nothing to shew that such a right might not be devised, descend, or sold, or disposed of.

The point was discussed in *The Bishop of Salisbury v. Philips(a)*. "It was in error upon a judgment in *quare impedit* after verdict for the Plaintiff. The Plaintiff declares, that *A.* and *B.* were joint tenants of the advowson of the church in gross; and being jointly seised, by indenture between them agreed, that they should stand seised of that advowson in common, and present severally by turns; and lays several presentations by each

(a) 1 *Lord Raym.* 535.

each of them ; and the Plaintiff claims, as executor to his father, the assignee of one of the said parties, for a disturbance in the time of his father. The bishop pleaded that it came to him by lapse. The Plaintiff replies, and shews that he presented *Sims* within six months, and the bishop refused him. The bishop rejoins, and confesses the presentation, and that the clerk came to him, and that he gave him time to prepare for his examination in three days, and that the clerk went away, and never returned, and issue upon the rejoinder, and verdict and judgment for the Plaintiff in the Common Pleas. Mr. *Cartew*, for the Plaintiff in error, assigned a variance between the original and the declaration. The original was, *præsentare ad ecclesiam de Staunton*; and the declaration was, *Staunton alias Staunton Fitzherbert*. But, *per Holt*, ‘one name is enough, and therefore *non allocatur*.’ The second exception. It appears that the Plaintiff has not any title. For, first, this indenture *nil operatur*, but it is only good by way of covenant; for if it was in case of lands, it would not amount to a partition; for nothing can do that, but what divides the title, and makes several rights to several parts, which cannot be in this case of one entire thing. And if it be admitted that this agreement would make them tenants in common, it would nevertheless be ill, for they could not present singly; and if they do, the clerk may be refused. Nor could the one of them grant the whole, which each of them ought to have, if this should amount to a division, for they cannot have part of an entire thing, and no two advowsons should be made of one. And there is no case in all the books of the law which warrants it.’

This is a very clear and distinct argument, and very well put, and which really contains all the arguments I yesterday heard at the Bar.

*Holt,*

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*Holt*, Chief Justice, said,—“ Doubtless they may make partition to present by turns, and that will divide the inheritance *aliquatenus* and create separate rights, so that the one shall present in the one turn, and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are the same. Indeed, it cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. But if this should not make a good partition, the question is, if one of them presents, and the bishop does not refuse his clerk for that reason, but refuses him obstinately without any cause, and a *quare impedit* is brought and admitted to be good, whether the grantee shall not recover his presentation. The Chief Justice thought this to be a very plain case. But at another day, because Mr. *Cartew* was so positive in the matter, that there were no authorities in the books which warrant this case, he said, that by the Stat. of *Westminster* 2, 13 *Edw.* 1, stat. 1, ch. 5, sect. 2, If divers persons claiming an advowson make compositions upon record to present by turns, and this composition is executed by presentation by one of the parties, the other may have a *scire facias* upon this agreement being upon record, and he is not put to his *quare impedit*: and that not only in a case of disturbance by one who was party to the agreement, but by a stranger. And that statute does not extend only to privies in blood, but also, as the 2 Institute, 362 says, to strangers also, which must be of tenants in common. In 28 *Hen.* 8, *Dyer*, 29a, pl. 194, If tenants in common of an advowson make composition to present by turns, and that is executed by all parties, in a *quare impedit* brought by any of them, they have no need to make mention of the composition; which shews, that by the composition, the inheritance and right is severed, and a separate interest vests in each of them

them to present alternately. The only difference is, that, in case of coparceners, they being privies in blood, the partition may be by parol; but between tenants in common it must be by deed." Here he refers to *Fitz.* Nat. Brev. 63, *d, f*; 11 *Hen.* 4, 3 *b*, and in *Coke's Entr.* 496 *b*, "grantee of a next avoidance, by a man who was so to present by turns, declares in *quare impedit* positively upon his grant, that he was '*possessio-  
atus de advocatione ecclesiae, predictæ pro prima et  
proxima vacatione ejusdem.*' And in *Fitzh.* Nat. Brev. 62 *a*, there is a stronger case, where a manor, with an advowson appendant, descended to two coparceners, and they made partition of the demesnes, and to present severally by turns to the church; this was a good partition, and the advowson was appendant at one turn to one part of the demesnes, and at the other to the other."

All these cases then shew that it really depends upon partition between themselves.

"Mr. *Cartew* cited a case in 2 *Mod.* 97, to the contrary, to which *Holt*, Chief Justice, said, *in irâ*, that no books ought to be cited at the Bar, but those which were licensed by the Judges. Judgment was affirmed."

The result of that appears to me to be, that tenants in common might undoubtedly make partition by deed, and if they did, the partition was by presentation in turns. This Court may also make partition, and I apprehend it would make partition in the same form.

My opinion, however, upon the state of the authorities, as at present advised, is, that this Court has authority to make a partition of an advowson, and that being

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being so, that it will, in the case of a family, follow, by analogy, the rule as to coparceners, and give the right of presentation to the members according to their seniority.

I do not feel myself bound by the *dictum* in the books, which appears to me not to be warranted by any authorities which have been hitherto found, and to be inconsistent with the principle which is admitted in the case as to coparceners, between whom and tenants in common, so far as this matter is concerned, I see no distinction in reason, the only difference between them being, that the one gets the estate by descent, and the other by purchase.

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DECREE.

Declare the right of presentation passed by the will, and that right to nominate, until the sale of the advowson, is vested in the younger children of the testator and their representatives, and is to be exercised according to seniority.

Direct a partition thereof.

Declare that *Charles P. Johnstone*, as the eldest tenant in common, is entitled to present upon the existing vacancy, &c., &c.

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NOTE.—On appeal, the Lord Chancellor and Lord Justice Knight Bruce held, that the right of presentation did not revert to the heir at law, but passed by the will, and that the right to present was to be decided by lot. See 6 *De G., M. & Gor.* 439.

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1856.

*June 19.  
July 21.*

## SPENCER v. TOPHAM.

THIS was a suit for the specific performance of a contract for the sale of a messuage and piece of land called *Putley*, containing about eight acres and a half, in the neighbourhood of *Bilston*. The contract was admitted, and the only question which arose was one of title, resolving itself into one point. The title being in all other respects admitted, the point was this: —Whether a sale of this property, which took place in *April*, 1846, was liable to be set aside, on the ground that it was a sale by a client to his solicitor, of which the vendor, on the present occasion, had notice when he bought from his vendor.

The *Putley* property originally belonged to Mr. *Bate*. In *April*, 1846, he sold and conveyed it, together with the *Brockhills* Estate, to Mr. *Moss Phillips*, his solicitor, for 1,820*l.* The purchase-money was not apportioned between the two properties, but the Court considered that the *Putley* Estate would not have produced more than 620*l.* In *May*, 1848, Mr. *Moss Phillips* sold the *Putley* Estate alone to the Plaintiff Mr. *Spencer*, for 1,620*l.*, who employed no other solicitor on the occasion than Mr. *Moss Phillips*.

In Purchase by  
a solicitor  
from his

client for 1,820*l.* upheld, though he had given about 100*l.* less than the value, and had two years afterwards sold part of the property at a fancy price, making a profit of 970*l.*

A title depending on the validity of a purchase by a solicitor from his client forced on an unwilling purchaser, on proof of the validity of the transaction, though given in the absence of the client.

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In 1850, Mr. *Spencer* deposited the conveyance with his bankers Sir *Francis Holyoake Goodricke* and *George Holyoake*, as a security for the balance due to them, and they obtained a legal mortgage in 1851. On the 16th of *March*, 1855, a contract was entered into by the Plaintiffs to sell it to the Defendant *Topham*, and the Plaintiffs, by this suit, sought to have the contract specifically performed.

The purchaser resisted the performance, on the ground of the invalidity of the original sale by *Bate* to *Moss Phillips*, his solicitor, of which, it was insisted, *Spencer* and his mortgagees had constructive notice.

*Mr. Rolt* and *Mr. Batten*, for the Plaintiffs.

*Mr. Follett* and *Mr. Sargent*, for the Assignees of *Spencer*.

*Mr. R. Palmer* and *Mr. Lambert*, for the Defendant.

*Mr. Rolt*, in reply.

*Edwards v. Meyrick*(a); *Kennedy v. Green*(b); *Grove v. Bastard*(c); *Holman v. Loynes*(d) were cited.

*The MASTER of the ROLLS* reserved judgment.

July 21.

*The MASTER of the ROLLS.*

I will first dispose of the question of notice, which is distinct, as applicable to the Plaintiff *Spencer* and as applicable

(a) 6 *Jur.* 924.

(b) 3 *Myl. & K.* 699.

(c) 2 *Phillips*, 619.

(d) 4 *D&G, M. & G.* 270.

applicable to the other Plaintiffs, who, as vendors, entered into this contract.

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v.
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I think it clear, that the Plaintiff Mr. Spencer had notice of this defect in the title (assuming it to be one), when he bought the property from Mr. *Moss Phillips*. He was, on that occasion, content to employ no solicitor other than Mr. *Moss Phillips* himself, and accordingly, he had notice of everything that his solicitor was acquainted with; and he therefore knew, that the purchase in *April*, 1846, was made by Mr. *Moss Phillips* from Mr. *Bate*, at the time when he was his confidential agent and solicitor.

At the time of the argument, I expressed my opinion that this constituted notice, and that the case of *Kennedy v. Green* (a) had no application. I retain that opinion, and think that that case rests on totally distinct grounds. Mr. *Spencer*, therefore, cannot, in my opinion, set up the plea that he was a purchaser for value without notice; but I am of opinion, that he had constructive notice, that unless the sale from Mr. *Bate* to Mr. *Moss Phillips* could be proved to be a valid sale, the title was defective.

The case of the mortgagees, Sir *Francis Holyoake Goodricke* and *George Holyoake*, is very different. They are bankers at *Wolverhampton*. In 1850, Mr. *Spencer* deposited with them the conveyance from Mr. *Phillips* to himself, as a security for the balance due on his banking account, which then amounted to 3,575*l.*, and for the balances which might thereafter become due. In 1851, when their balance was 7,423*l.*, the bankers handed this deed to their solicitors, with directions

(a) 3 *Myl. & K.* 699.

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directions to prepare a mortgage to them to secure the amount of this balance. The amount now due on this balance is the sum of 7,819*l.* Sir *Francis Goodricke* and Mr. *Holyoake* swear, that until the objection was taken to the title, in this case, they had no knowledge of the fact that Mr. *Moss Phillips* had acted as the solicitor of Mr. *Bate*. They did not employ any solicitor in the transaction till late in the year 1851; they had, therefore, no notice of any sort, either actual or constructive, up to the time when they employed Mr. *Hawkesford*, their solicitor, to prepare the mortgage deed. They are, therefore, purchasers for value, without notice, under and to the extent of the equitable mortgage, which subsisted when Mr. *Hawkesford* was employed to prepare the mortgage security; and the fact, if it be so, that Mr. *Hawkesford*, when he prepared the mortgage security and when the legal estate was conveyed to the bankers, had notice of the circumstances attending the sale from Mr. *Bate* to Mr. *Moss Phillips* in April, 1846, will, in no respect, prejudice the right of the bankers to insist on being purchasers for value, without notice, to the extent of 7,423*l.*, the amount of the balance due to them when they instructed Mr. *Hawkesford* to prepare the mortgage security. As, therefore, the money was, in substance, advanced on this security before Mr. *Hawkesford* was consulted, I think it unnecessary to consider whether the fact that Mr. *Hawkesford*, their solicitor, knew that Mr. *Moss Phillips* had frequently or usually acted as the solicitor of Mr. *Bate*, while he did not know that he was Mr. *Bate's* solicitor in and at the time of the transaction in April, 1846, amounted to notice of the possible defect in the sale.

As the sums for which the bankers were purchasers for value, without notice, exceeds the amount of the purchase-money,



purchase-money, on the present occasion, and as they have a power of sale in their mortgage deed, it might possibly be considered unnecessary to consider the ultimate question, which has been principally argued before me. But I have thought it desirable that I should do so, and on this part of the case also, I have formed an opinion in favour of the case of the Plaintiff Mr. *Spencer*. The question, as I regard it, is whether, if this were a suit by Mr. *Bate* against Mr. *Moss Phillips* to set aside the sale to him, I should make a decree to that effect. In such a suit, the fact, of Mr. *Moss Phillips* having been the solicitor of Mr. *Bate* in the transaction, would throw the burthen of proof on Mr. *Moss Phillips* to prove the validity and *bona fides* of the transaction. So regarding it, I am of opinion, that on the evidence before me this is done. The test applied to these cases has been very properly stated to be this: —That the solicitor must establish, that the sale was as advantageous to the client as it could have been if the solicitor had used his utmost endeavours to sell the property to a stranger, and that the burthen of proving this lies on the solicitor, or any persons claiming through him.

In the present case, no question arises on the form of the conveyance, which is not suggested to have been objectionable. The purchase-money, if sufficient, was actually paid in discharge of a judgment entered up against the vendor by a stranger, which, though transferred to the solicitor himself, seems to have been so, rather to assist his client than otherwise, and was not to secure any bill of costs to the solicitor, which might require taxation. No undue influence or pressure is suggested to have existed, nor does it seem compatible with other parts of the case. If, therefore, the price given was adequate, all objections springing out of the
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fact that this was a purchase by a solicitor from his client cease. The question, therefore, resolves itself into one of adequacy of value.

The state of the evidence as to value stands thus:—The *Putley* contains eight acres, two roods and twenty-three perches. It was let for 17*l.* per annum to Mr. *Moss Phillips*, from year to year; that is, at 2*l.* per acre. It was in the neighbourhood of *Bilston*, and, therefore, it was increased in value by its proximity to that place; but there is no suggestion that this was not a full and adequate rent for the property. Forty years' purchase at that rent would amount to 680*l.* In *September*, 1844, it was offered for sale by public auction; the reserved bidding was 760*l.*; the highest amount offered at the sale was 620*l.* It was subsequently offered to several persons at 700*l.*; but they all refused to take it at that price. It was then offered to Mr. *Chinner* at 78*l.* per acre, which would amount to 674*l.* 4*s.* 3*d.*; but Mr. *Chinner* refused to give that sum, on the ground that the price asked was too great. It is true that Mr. *Walker*, a surveyor, valued the land at 756*l.* 6*s.* 6*d.*; but I have repeatedly had occasion to remark how little reliance can be placed on the opinion of surveyors and valuers, and that the only real test is what the property will fetch in the market, and that this is only really ascertained by attempting *bonâ fide* to sell, either by the putting the property up to auction, or by making or receiving offers to sell by private contract. The evidence I have referred to satisfies me that more than 620*l.* could not then have been obtained for *Putley*. The evidence also establishes, that Mr. *Bate* was making various attempts to sell the property, but unsuccessfully, up to the month of *April*, 1846, when the conveyance was made to Mr. *Moss Phillips*.

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The conveyance in question of the 22nd *February*, 1846, conveys the *Putley* and the *Upper* and *Lower Brockhills* to Mr. *Moss Phillips* for 1,820*l.* It makes no appropriation of part of the purchase-money to one property and part to another; and although, in the evidence, it is attempted to attribute 700*l.* to the *Putley* and the remainder, viz. 1,120*l.*, to the *Brockhills*, there is nothing in the evidence to justify that conclusion, except some statements by witnesses to the effect that they had heard, that Mr. *Moss Phillips* had bought the *Putley* for 700*l.*, which clearly amounts to nothing. The question of appropriation also is scarcely material, because if the price of the *Brockhills* was sufficiently inadequate to set the sale of that property aside, it would avoid the whole deed, and, therefore, as well the sale of the *Putley* as that of the *Brockhills*. The question, then, is this:—Was the price of 1,820*l.* given for the *Putley* and the *Brockhills* an inadequate price, so that the Court would, on that account, set aside this sale by the vendor to his solicitor? The evidence respecting the value of the *Brockhills* is less complete than that relative to the *Putley*. It does not appear what the average was? what the situation of it was? what the rental of it was? and if any offer by private contract to sell or buy it was ever made, no evidence is given of it. Mr. *Walker* seems to have valued it together with the *Putley* at 2,021*l.* 8*s.*, which, attributing 756*l.* 6*s.* 6*d.* to the *Putley*, leaves the sum of 1,265*l.* 1*s.* 6*d.* as attributable to the *Brockhills*.

The other evidence which is given of the value is more complete and satisfactory. The *Brockhills* were put up for sale by auction with the *Putley* Estate in *September*, 1844, the reserved bidding at which it was bought in was 1,400*l.*, the highest bidding made was 1,300*l.*, which seems to have been more than the sum  
at

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at which it was valued by Mr. *Walker*. No explanation is offered, why the reserved bidding, in one case, was fixed above, and in the other below the amount of Mr. *Walker's* valuation. It is, therefore, established by the evidence, that in *September*, 1844, these united properties might have been sold for the aggregate price of 1,920*l.* The price given by Mr. *Moss Phillips*, in *April*, 1846, was 1,820*l.*; it was, therefore, 100*l.* less than Mr. *James Bate* might have obtained for the property in *September*, 1844, and I assume 100*l.* less than he might have obtained had he then put these properties up again to auction. There is nothing to shew that either property had increased in value between 1844 and *April*, 1846, and I assume that the value remained the same.

I have now, therefore, to consider, whether, on that account, I ought, at the instance of Mr. *Bate*, if he were now the Plaintiff, to set aside the transaction. There is not only nothing to shew that Mr. *Bate* was not as fully aware of the value of the price of land as Mr. *Moss Phillips* or any other person could be; on the contrary, the inference to be drawn from the whole of the evidence is, that he was perfectly well acquainted with the whole matter, and had been so for years, and fully capable of judging what was for his own advantage. Was a deduction of 100*l.*, that is, 4*l.* more than 5*l.* per cent. from the price which might have been obtained on a sale by auction, or by private contract with a stranger, a reasonable amount, so that Mr. *Bate* might well and usefully agree to it? I think he might. Mr. *Moss Phillips* knew the title he would have, and obviously could not make any difficulties on that head; by this means, probably, some expense was avoided, which, without knowing the particulars of the title by which this property was held, might have been incurred by

by the vendor, either in making out the title as to points which a purchaser might insist upon, or by conditions of sale precluding the necessity of making them out.

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In the next place, all delay was avoided. In the ordinary case of a contract for sale of a property, many months are consumed before the sale is concluded and the purchase-money received. By this arrangement with Mr. *Moss Phillips*, therefore, the expenses of an auction, and the expense and delay of making out a title were avoided, and the purchase-money immediately made available. That it was applied in payment of the judgment debt, and that the judgment was vested in Mr. *Moss Phillips*, does not, as I have already remarked, appear to me to be material. A deduction of 100*l.* for these purposes, does not appear to me to be unreasonable. Nor do I think, that there is any ground for supposing, that Mr. *Bate* was not perfectly well aware of what he was doing at the time when he entered into the contract, or that he did not believe, that he found his own advantage from the course which he adopted. If Mr. *Moss Phillips* could have got a stranger to have accepted the title without investigation, and paid at once 1,820*l.*, it appears to me, looking at the rest of the evidence, that any person in the position of Mr. *James Bate* might reasonably have accepted the offer, as the best course he could adopt.

It is true, that two years afterwards Mr. *Moss Phillips* sold the *Putley* to Mr. *Spencer* for 1,620*l.* 2*s.* 6*d.*, but this is not sufficient to counterbalance the previous evidence. It is clear that Mr. *Spencer* was prepared to give a fancy price for the property, and that Mr. *Moss Phillips*, very naturally, took advantage of this, and obtained from him all that he possibly could. I see, however, no reason for supposing, that that price could have

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have been obtained from any other person, though it may well be, that Mr. *Moss Phillips*, not wishing to part with the property, might have refused to allow any person to have it, except at a sum far exceeding its ordinary market value. And it is, in my opinion, established, that nothing more than 620*l.* could have been obtained in 1844.

Upon the whole consideration of this part of the case, I see no ground on which the Court would set the sale from Mr. *Bate* to Mr. *Moss Phillips* aside. I think that, having regard to the circumstances I have before mentioned, the price was a fair one, that Mr. *Bate* was perfectly well aware of what he was about, and understood the value as well as Mr. *Moss Phillips*, and that no peculiar influence was possessed by him over his client Mr. *Bate*; indeed none such is suggested. In this state of things, I am clear that this Court would not set aside the transaction between Mr. *Moss Phillips* and Mr. *Bate*, leaving out of consideration wholly the length of time which has elapsed.

It is suggested, however, that this Court will not force a doubtful title upon a purchaser, and that although, upon the evidence before me, the Court would not invalidate the purchase by Mr. *Moss Phillips*, yet that the heir of *Bate* will not be bound by the proceedings in this suit, and that he may possess or be able to obtain stronger evidence, and ultimately succeed in avoiding the transaction. I think that I cannot attend to this suggestion. I must deal with the facts as I find them proved in the evidence before me. I know that in every case of a sale, some facts might by possibility exist, which, if proved, would induce this Court to set it aside as fraudulent and void; but if full scope was given to this suggestion, no good title could ever be made,

made, where one of the steps in the anterior title was a purchase by a solicitor from a client, unless the client or his proper representative could be induced to join in the conveyance. I have a considerable mass of evidence on this subject. The nature and character of the transaction is, I think, fully proved ; and upon this, I find myself compelled to come to this conviction, that it could not now be disturbed. In this respect, therefore, I think that a good title can be made.

The only other subject brought to my attention relates to the water, and on this point there exists, in my opinion, no ground for avoiding the contract. I think it unnecessary to go through the evidence on this subject. The evidence given for the Defendant is, in my opinion, conclusive against him ; he employed Mr. *Walker* to examine the property, Mr. *Walker* took particular pains on this subject, he examined whence the supply arose, he was informed that the supply from the well was not sufficient, and that the rest of the supply came from the pond which had been made by Mr. *Spencer*. He had every opportunity of examining the matter ; and even without noticing the contradictory testimony of the Plaintiff, he fails completely in making out that any representations, at variance with the truth, were made to him, or that either he or the Defendant were, in any respect, misled by any such representations, or that they misunderstood the exact nature and character of the supply.

I am of opinion, therefore, that a decree must be made for the specific performance of the contract, and as in all other respects the title is accepted, there will be no reference as to title, and the decree will be (subject to what Counsel may have to suggest) to the following effect :—

Decree

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Decree a specific performance of contract, and the Defendant, admitting that a good title is shewn in all other respects, except so far as regards the conveyance of the 22nd April, 1846, by Mr. *Bate* to Mr. *Moss Phillips*, declare that a good title is shewn to the hereditaments in question. Direct a conveyance to be executed accordingly, and take a reference to chambers to settle the conveyance, in case the parties differ about the same.

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*June 28.*

There being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee. Held, that the Plaintiff, who was interested in the trust property, was entitled to a Receiver.

THE testator, who died in 1851, devised and bequeathed his real and personal estate to his son *Joseph Swale*, *Henry Anderson* and *Richard Holden*, on certain trusts for his two sons, viz., the Plaintiff *Thomas Swale*, and the Defendant *Joseph Swale*, and their children. He appointed the trustees his executors.

The Plaintiff, by the present bill, complained, that *Joseph Swale* and *Henry Anderson* had acted in the trusts without communication with *Holden*, the other trustee, and that they had excluded him in the administration of the estate, and taken securities in their own names alone. The extent to which they had thus acted is stated in the judgment of the Court.

The bill prayed for the administration of the estate, for the appointment of new trustees in the place of *Joseph Swale* and *Anderson*, and for a Receiver.

A motion was now made for a Receiver.

Mr.

Mr. *R. Palmer* and Mr. *Osborne*, in support of the motion.

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Mr. *Lloyd* and C. C. *Barber*, *contrā*.

*The Master of the Rolls.*

I think the Plaintiff is entitled to a Receiver.

What has taken place is thus described in the answer:—*Joseph Swale* and *Henry Anderson* ask Mr. *Holden* to concur with them in making certain investments of the trust property. Mr. *Holden*, disagreeing with them, refused to concur. Thereupon, they continued to act in the trusts, without conferring with or consulting him. It appears also, that they have actually advanced money on certain securities, omitting the name of Mr. *Holden*, and that in one case, they have taken a security in the name of one only. This Court cannot approve of one trustee investing trust money in his own name exclusively of the others.

It is suggested, that one executor may act without the concurrence of the others; but it is impossible to say that this can be treated as an executorship account. The testator died four years and a half ago, and this transaction seems to have taken place, not in their character of executors, but in their character of trustees. I think that the Plaintiff, who is interested in the property, is not to be excluded in this manner.

The answer of the two trustees is this:—they say, that if Mr. *Holden* will concur with them, they will be exceedingly happy to go on and act together, but that if he differ from them, then that they must act for themselves.

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selves. Considering the manner in which this Court deals with trustees, whenever a breach of trust is committed, and the way in which *Holden* might be involved in one, it seems not unreasonable that he should insist on his view of the case being adopted, or, at least, that the view of the other two trustees should not control him. The testator intended to have the assistance and discretion of three trustees, but here, as it sometimes happens, they do not act amicably together, their united assistance and discretion cannot be obtained, and the majority act alone in the administration of the trust. In that state of things, the Plaintiff is entitled to have the Receiver appointed.

A necessity is shewn for some interposition to protect this property, not merely for the sake of the two tenants for life, but for the interest of the persons who may hereafter become entitled, who are not *sui juris*, and are a class at present unascertained.

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SPARKES *v.* RESTAL.*June 26, 27.*

THIS case came on for further consideration, the question being, whether an executor was to be charged with 100*l.*, which had been lost under the circumstances stated in the judgment.

Mr. R. Palmer and Mr. G. Hastings, for the Plaintiff.

Mr. Lloyd, Mr. Bevir, Mr. C. Hall and Mr. W. H. Clarke, for the Defendant.

The Master of the Rolls reserved judgment.

The Master of the Rolls.

The principal question is, whether the executor is to be surcharged with a sum of 100*l.* The circumstances under which the question arose are these:—A note of hand, dated in *May*, 1823, had been given by five persons to the testator *John Restal*. It is not produced, but I presume that it was an ordinary promissory note.

The testator died in 1829, and what took place respecting it does not appear, except from some entries in a book kept by the executor. All the interest on this note was paid, and *Thomas Blanch*, who was one of the five payors, gave *Thomas Restal*, the executor, another note for 100*l.*, dated the 22nd of *May*, 1837. The interest was paid on this note down to *May*, 1841, the last payment having been made in *January*, 1842.

Nothing

A testator died in 1829; part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute. Held, that the taking the second note was equivalent to payment of the first, and the executor was charged with the 100*l.*

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Nothing was done on it subsequently, time was allowed to elapse, by which it was brought within the operation of the Statute of Limitations.

Under these circumstances, I must assume that the first note of hand could have been enforced against the five persons, for without that, it would be impossible to account for the payment of interest and the giving a fresh note. In what way am I to treat the acceptance of the second note? I think it was equivalent to payment. The executor gave up the old debt, which became clearly discharged and abandoned, and no action at law could have been brought on the old note. I must treat this as a new security given in payment of the old debt. The executor must therefore be charged, and the balance against him must be increased by 100*l.*

July 8.

The whole of a life interest in a fund belonging to a feme covert was given (under the circumstances) to her, in exclusion of all right of the assignee in insolvency of the husband, though the husband and wife were living together.

KOEBER v. STURGIS.

A SUM of 1,000*l.*, *London and North-Western Railway* stock, was transferred into the names of three trustees, and under an indenture of the 12th of July, 1852, it was to be held by them, in trust to pay the dividends and annual proceeds unto *Emma Overton* "during her life, for her absolute use and benefit," with remainder for Sir *Hector Greig* absolutely. In September, 1852, *Emma Overton* married *José Alvarez Santullano*, a Spaniard, and there were two children of the marriage. In October, 1854, *Santullano* took the benefit of the Insolvent Debtors' Act. The Plaintiff, who was his assignee, filed this bill against *Santullano*, his wife and the three trustees, to recover the dividends since



since the insolvency, or such part as the Court should think fit.

In opposition to this claim of the Plaintiff, Mrs. *Santullano* made an affidavit, stating, that no settlement had been made on her marriage, and that her husband had then received 250*l.* of her money. Her affidavit proceeded as follows:—

“That, in consequence of the cruelty of the said *José Alvarez Santullano*, a separation took place between us, and a deed of separation was executed on the 11th day of *August*, 1855, and for about two months after such separation I lived separate from him, but at his urgent request, and on his faithful promises of amendment, I returned to live and *am still living with him*.

“That, since I returned to him, he has behaved more cruelly than before, frequently kicking and beating me, and leaving me with the two children for days together without food or money, and I have been obliged to borrow small sums to enable me to obtain food for myself and children.

“That the said *José Alvarez Santullano* has frequently threatened me that he would go again to *Spain* and leave me and the children here. That I and the children are wholly dependent on him, except to the extent of my rights under the settlement [of the 12th of *July*, 1852].

“That, on *Monday* the 19th day of *May* instant, the said *José Alvarez Santullano* again beat and kicked me in a most cruel manner, and turned me out of the house at about six o'clock in the evening, and that in consequence thereof, the next door neighbour allowed me to

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sleep in her house during the night; and this 20th day of *May* instant, the said *José Alvarez Santullano* has removed nearly all the furniture in the house, and taken it away."

Mr. *Amphlett*, for the Plaintiff. The life interest of Mrs. *Santullano* vested in her husband on her marriage, and passed under his insolvency to his assignee. Some portion at least belongs to the Plaintiff, for the Court never deprives a husband of the whole income of his wife's property, unless there has been a desertion. Here, on the contrary, the husband and wife are now living together. The alleged ill usage was subsequent to the insolvency, and cannot affect the Plaintiff's rights, for if it were otherwise, it would, in such a case as this, be holding out a premium to a husband to beat his wife in order to obtain the whole income from the creditors, nominally for his wife, but in reality for his own benefit while they were living together.

Mr. *Hobhouse*, for the trustees.

Mr. *Osborne*, for Mr. *Sturgis*.

Mr. *Lloyd* and Mr. *Surrage*, for the insolvent and his wife.

*Vaughan v. Buck* (a); *Bagshaw v. Winter* (b); *Ex parte Pugh* (c); *Napier v. Napier* (d); *Dunkley v. Dunkley* (e); *Scott v. Spashett* (f); *Gardner v. Marshall* (g); *Francis v. Brooking* (h); *Re Cutler* (i);  
*Marshall*

- (a) 1 *Simons*, N. S. 284.
- (b) 5 *De G. & Sm.* 466.
- (c) 1 *Drew*. 202.
- (d) 1 *Dru. & War.* 407.
- (e) 2 *De G., M. & G.* 390.

- (f) 3 *Mac. & Gor.* 599.
- (g) 14 *Simons*, 575.
- (h) 19 *Beav.* 347.
- (i) 14 *Beav.* 220.

*Marshall v. Fowler* (*a*), were cited. But see *Tidd v. Lister* (*b*).

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*The Master of the Rolls.*

I do not think that a guinea a week is too much for the wife. She shall have the whole, and the bill must be dismissed with costs.

(*a*) 16 *Beav.* 249.

(*b*) 10 *Hare*, 140, and 3 *De G., M. & G.* 857.

**SEAMAN *v.* WOOD.**

July 25.

THE testatrix gave the residue of her moneys and estate, when got in and invested, upon trust for her son *Edward Seaman* for life (subject, nevertheless, to the proviso thereinafter contained), and after his death, upon trust "to pay or transfer" such residue as follows:—"unto, between or amongst such child or children of my said son, as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married (whichever shall first happen), and also such child or children of any son of *Edward Seaman* who shall die under the age of twenty-one years, as being a male or males shall attain that age, or being a female or females shall attain that age or be married (whichever shall first happen), and if more than one, to be divided between or among them

Where there is a gift to a class, some of the objects of which are too remote, and some not, effect cannot be given to the latter separated from the former, but the whole gift is void.

The produce of real and personal estate was bequeathed upon trust for *A.* for life, and after his death upon trust "to pay or transfer" it unto such children of *A.* as

should attain the age of twenty-one years, and also such children of any son of *A.* who should die under twenty-one, as should attain that age, equally, but the children of any deceased son, collectively, to take their parent's share equally, with certain gifts over. Held, that the whole of the limitations subsequent to the life estate were void for remoteness.

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them in equal shares and proportions, as between brothers and sisters, but so that the child or children, collectively, of any deceased son of my said son shall take only the share which such son would have taken if living, and if more than one, in equal shares and proportions.

There was then a gift over to other persons, "in case there should be no child or other issue of her son who should take a vested interest under the trusts aforesaid." The will also contained a proviso, "that in case her son should become bankrupt, the trustees should thenceforth, during his life, apply the income for the benefit of his children; and in case and while there should be no such child, then the trustees were to accumulate the income until the death of the son." The will then contained powers for maintenance and education (after the determination of the life estate of the son) of any children being presumptively entitled to any shares in her residuary estate.

The Plaintiff *Edward Seaman* was the heir at law and sole next of kin of the testatrix; he had no children or issue. The Defendants were the trustees and executors of the will.

This bill insisted, that, according to the true construction of the will, the class of persons, consisting of children and grandchildren, to whom the testatrix's residuary estate was expressed to be given upon the Plaintiff's death, included persons who could not take, by reason of the rule against perpetuities; and that, therefore, the trust for such class, and the gift over in case there should be no child or other issue to take a vested interest, under such trust, were respectively void for remoteness, and that the testatrix's residuary estate, after

after the Plaintiff's death, was, therefore, undisposed of and belonged to him as heir at law and sole next of kin.

**Mr. R. Palmer** and **Mr. H. W. Cole**, for the Plaintiff, relied on *Gooch v. Gooch* (*a*), and the cases and authorities there cited.

**Mr. Follett** and **Mr. Amphlett**, argued that the clause in question did not fall within the rule against perpetuities, and that *Gooch v. Gooch*; *Leake v. Robinson* (*b*); *Bull v. Pritchard* (*c*); *Gee v. Audley* (*d*), and that class of cases did not apply, for in all those cases the gift was so mixed up, that it could not be divided, and the valid portion separated from the invalid; but that in the present it might be, for the gift to the children was perfectly good, and the gift to the grandchildren was substitutional, besides the children took equally, and, therefore, the separate share of each child who attained twenty-one was not rendered void by anything that occurred to a separate share which might render it invalid. They relied on the clause for maintenance and education as sufficiently indicating the testatrix's intention as to the vesting of the shares, and argued that, at all events, the decision of the Court ought to be deferred until the time arrived for a distribution of the fund, and for a declaration of the rights of the parties. They referred to a precedent in *Jarman's Bythewood*, by *Sweet* and *Bissett* (*e*), precisely similar to the clause in the testatrix's will.

**Mr. Roupell** and **Mr. W. D. Lewis**, for the parties interested

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| <p>(<i>a</i>) 3 <i>De G., M. &amp; G.</i> 366,<br/>and 14 <i>Benv.</i> 580.<br/>(<i>b</i>) 2 <i>Meriv.</i> 363.<br/>(<i>c</i>) 1 <i>Russ.</i> 213.</p> | <p>(<i>d</i>) 2 <i>Ves. jun.</i> 365, n.; <i>S. C.</i><br/>1 <i>Cor.</i>, 324 as <i>Jee v. Audley</i>.<br/>(<i>e</i>) Vol. XI. 3rd ed. p. 549.</p> |
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interested under the gift over, contended that the residuary gift was not void for remoteness. That where a fund was given amongst several objects, some of whom might not be able to take, and the excess could be ascertained, the objects who might become capable of taking could, as in the present case, take their shares. That if a fund were given in moieties between a parent capable of taking, and his children at such an age as made them incapable of taking, the parent who had attained a vested interest would be clearly entitled to his moiety, whatever might occur as to the gift to his children.

*Greenwood v. Roberts (a)* was also mentioned.

Mr. Palmer was not called upon to reply.

*The MASTER of the ROLLS.*

My opinion is that this gift is void for remoteness. I concur in the argument, that this is a question of construction upon the meaning of the words of the gift. But the way I look at it is this:—If a man gives an estate, or a sum of money, to all the children of *A.* and all the grandchildren of *B.*, to be divided among them in equal shares and proportions, and both *A.* and *B.* survive the testator, I have very little doubt that such a gift would be void for remoteness, for the class, which consists of the children of *A.* and the grandchildren of *B.* cannot be ascertained until the grandchildren of *B.* are ascertained, and that will be at a period too remote. Would the case be varied if the children were to take one-half of what the grandchildren were to take? Would that vary the construction of the gift?

In

(a) 15 Beav. 92.

In my opinion, the class here to take consists of the children who attain twenty-one, and a limited class of the grandchildren, namely, those who attain twenty-one, but are children of children who have died under twenty-one. Therefore, the class to be ascertained consists of the Plaintiff's own children and the grandchildren who attain twenty-one born of deceased infant parents. There is a direction afterwards as to what shares they are to take: the children are to take equal shares and the grandchildren collectively are to take the shares which their parents would have taken, if they had lived. This class will not, necessarily, be determined within the period allowed by the rule against perpetuities.

I think that this is a gift to a class which is too remote, and that the principle of *Leake v. Robinson* applies.

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**EXTRACT FROM DECREE.**

"Declare the class of persons consisting of children and grandchildren of the Plaintiff, to whom the testatrix's residuary estate is expressed to be given upon the Plaintiff's death, includes persons who cannot take, by reason of the rule against perpetuities, and that the trusts for such class, and also the gift over, in case there shall be no child or other issue to take a vested interest under such trust, are respectively void for remoteness; and that the whole of the testatrix's residuary real and personal estate, after the Plaintiff's death, is therefore undisposed of by the said will, and belongs to the Plaintiff as the heir at law and sole next of kin of the testatrix. This declaration to be without prejudice to the trusts declared for the benefit of the Plaintiff's children, during the life of the Plaintiff, in the events in the will in that behalf mentioned, or in any of those events," &c.

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Persons had purchased family graves in perpetuity in a private burying ground, which was afterwards closed by order of the Queen in council. There was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money stating the purchase. Held, that they were entitled to an injunction to restrain the trustees from removing or injuring the graves or gravestones, &c. But held also, that the relief must be limited to the spot purchased by the Plaintiffs, and that the rights of the trustees to the remainder was unaffected.

**MORELAND v. RICHARDSON.**

**I**N 1757 and 1766, the Rev. *George Whitfield*, being desirous of establishing chapels, with suitable burial grounds adjoining, obtained leases of a piece of ground in *Tottenham Court Road*, whereon he erected a chapel, partly by subscription and partly out of his own moneys; the remainder of the ground was appropriated to the purposes of a burial ground.

After the expiration of the last lease, the inheritance of the property was, in *June*, 1831, purchased and conveyed to the trustees of the chapel, and it was, in the same year, mortgaged to Mr. *Tudor* to secure 6,000*l.* advanced by him.

The trustees and managers, on the 30th of *June*, 1831, caused an advertisement to be published in the "Times" newspaper, stating as follows:—"Tottenham Court Chapel and Burial Ground. The above premises being now purchased in perpetuity, and placed in the hands of trustees, those persons who held family graves under the late lease, and wish to purchase them, are requested to apply to Mr. *Nodes* [the clerk and sexton], who will give them every necessary information."

The five Plaintiffs respectively, and several other persons possessed of private or family graves or vaults in the burial ground, thereupon purchased graves in perpetuity.

They protected these graves or vaults by headstones and

and footstones, or by brick work covered in with large stone slabs or tombstones, or monuments.

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No grants appeared to have been ever executed of this right of burial, but the contracts were evidenced by receipts given to the purchaser, the earliest of which was dated in 1833. It was in the following form :—

*"Feb. 4, 1833.*

" Received of Messrs. *John Curtis* and *Henry Hanks*, ten pounds ten shillings for a family grave in the burial ground of *Tottenham Court Chapel*, which grave is now sold in perpetuity, and is situated in the ground on the south side of the chapel near the entrance gate.

" For the trustees,

" *Oliver Nodes*,

" £10 : 10s. 0d.

" Clerk and sexton."

The burial ground having become filled, was closed for the purposes of burials, by an order of the Queen in council, pursuant to the provisions of the 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, and 18 & 19 Vict. c. 128.

In *May*, 1856, Messrs. *Harmer*, builders, by the direction of the Defendants *Laimbeer*, *Hone* and *Dunn* (acting, as the Court held, as trustees or managers) commenced levelling the ground of the churchyard. In doing so, they pulled down and removed the tombs, tombstones, &c. of the private or family graves or vaults purchased by the Plaintiffs and others, and they employed the stones in paving the court-yard surrounding the chapel, which, for that purpose, they cut and defaced.

It was also alleged, that the Defendants intended to convert the churchyard to other purposes.

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Under these circumstances, the five Plaintiffs filed the present bill against Mr. *Rickardson* (the minister of the chapel), the Messrs. *Harmer* (the builders), and against *Lainbeer, Hone and Dunn*, praying an injunction in the following terms, viz. :—to restrain the Defendants, &c. “from removing, destroying, defacing, cutting, breaking, or otherwise injuring or intermeddling with the private or family graves or vaults of or belonging to the Plaintiffs, or of or belonging to such other persons as shall contribute to the expense of this suit, and being in the burial ground adjoining to the chapel in *Tottenham Court* Road aforesaid, or the tombstones, inscription stone, monuments, headstones, footstones, or fences now or lately upon or around the private or family graves or vaults respectively, and from destroying, obliterating or defacing the inscription thereon, and from using or applying the tombstones, inscription stones, monuments, headstones, footstones or fences to any other purpose, or on any other spot or place, than as they were used or applied, upon or over the private or family graves or vaults, to which the same respectively belong, and from continuing to use or applying the same as for pavement stones, or for any other purpose whatever, than as covering, or protections, or records of the graves or vaults, and from letting, using or applying the said burial ground for building purposes, or any other purposes of profit, or otherwise than to protect and keep the same as a burial ground, subject to the provisions of the Acts of Parliament.”

It appeared from the affidavits, that *Tudor*, the mortgagee, had been paid off, and his mortgage been transferred to the Defendants, *Lainbeer, Hone and Dunn*, who, on this motion, claimed to be mortgagees by a title paramount to that of the Plaintiffs. But the Plaintiffs alleged, that *Tudor* had been paid off by an arrangement,

ment, by which he had consented to accept 3,000*l.* in full of all demands, and that this sum had been raised by subscription; that, consequently, *Lainbeer, Hone* and *Dunn* were merely trustees of the chapel, and the Court, on the affidavits, came to the conclusion, that, for the purpose of this interlocutory application, they were to be treated as trustees.

A motion was made for an injunction.

Mr. R. Palmer and **Mr. Greene**, in support of the motion. The receipts shew that the Plaintiffs have purchased family graves in perpetuity, they have paid the consideration, and have erected tombs and incurred expenses on the faith of the contract. Therefore, though there has been no legal grant of the easement, still the Court will protect the Plaintiffs' equitable rights, as was done in *The Duke of Devonshire v. Eglin*(a). Even at law, a party can maintain an action for removing or defacing a tombstone; and it has been held, that, though the freehold of the churchyard is in the parson, trespass lies, for the executor, of a tombstone against a person who wrongfully removes it from the churchyard and erases the inscription; *Spooner v. Brewster*(b). The Defendants are not mortgagees, but mere trustees. Even if they were mortgagees, they could not alter the nature of the property, *Hughes v. Williams*(c), where it was held, that a mortgagee was not justified in opening a slate quarry.

Mr. Follett and **Mr. W. R. Ellis**, *contrā*. 1st. The Plaintiffs have purchased, in perpetuity, the mere graves or right of burial, but not the right of preventing any alteration

(a) 14 *Beav.* 530. (b) 3 *Bing.* 136.
(c) 12 *Ves.* 493.

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alteration being made in the surface of land not inconsistent with the easement purchased. 2nd. The Defendants are mortgagees under a title paramount to that of the Plaintiffs, for the mortgage is prior in date to that of the receipts, and whatever rights the Plaintiffs have, they are on the equity of redemption, and they can only maintain them by redeeming the Defendants. 3rd. The thing complained of is complete, and a mandatory injunction cannot be granted; *Deere v. Guest* (a). 4th. There is a misjoinder of Plaintiffs, for their rights are separate and independent, they do not sue on behalf of all the persons having similar rights, and can only have relief in respect of their individual interests. Lastly. The churchyard being closed, it is to the interest of every one that it should be levelled, and not left waste and in disorder, so as to become a nuisance to the neighbourhood.

Mr. R. Palmer, in reply, referred to *Tulk v. Moxhay* (b).

July 14.

The Master of the Rolls.

This is a motion by five persons, who have separately purchased the right of burial in family vaults at the chapel in *Tottenham Court Road*, to prevent certain persons, who claim to be the sole assignees of a mortgage of the chapel and burial ground, from doing certain acts towards defacing and destroying the graves and the gravestones in the burial ground itself. The notice of motion is in the terms of the first paragraph of the prayer of the bill.

It

(a) 1 *Myl. & Cr.* 516. (b) 11 *Beav.* 571, and 2 *Phillips*, 774.

It is obvious that this extends far beyond the mere graves and vaults of the Plaintiffs. It is not a bill by the Plaintiffs "on behalf of themselves and all other persons who are similarly situated," but it is confined to their own case, so far as they are purchasers of a right of burial in a family vault, and does not extend to those parts of the ground in which the Plaintiffs are not interested. They do not pretend, in terms, to have bought a right to have the rest of the ground preserved as a burial ground, or that those other parts should not be converted to other purposes. On this part of the case, therefore, I offered a trial at law to the Plaintiffs, to determine whether, wholly independent of any question of legal estate, there might not be, in a private burial ground attached to a private chapel, as distinguished from a parochial burial ground, a right to have the burial ground preserved unmolested and unaltered from its original purpose, except so far as it might have been altered by any Statute. This was declined, and it is admitted (and I have no doubt most correctly) that the rights of the Plaintiffs depend upon and are confined to their equitable title under the purchases made by them.

I shall, in considering this question, in the first instance consider, how it stands independently of any Statute, and then consider, how far it may be affected by the Statute of the 15th and 16th of the Queen, chapter 85.

The rights of the Plaintiffs depend upon purchases made by them respectively, as shewn by a receipt in writing for the purchase-money, specifying the purposes for which the sales were made, and by subsequent occupation; this is the only evidence of the purchase.

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The receipts relating to the sales to the Plaintiffs differ but little in terms, and that, which is set out in the bill, is a very fair specimen of them.

This receipt, therefore, as it does not include, excludes the right to prevent the trustees from devoting the rest of the burial ground to any other purposes. It confines the sale to a right of burial in a family grave, in a specified spot on the ground. As long as this is preserved (so far as this document is concerned) the trustees may do whatever they like with the rest of the ground. Independently of contract, it is admitted that they have no right, and the contract is confined to this particular spot, which, therefore, is the limit of the right of the Plaintiffs against the trustees of the chapel, and consequently no relief can be given, in the present state of the record, except so far as relates to these five spots of ground, which constitute the graves or family vaults so purchased by the Plaintiffs.

The Defendants, however, contest the right of the Plaintiffs even to this limited relief, and they claim to be mortgagees, by a paramount title, prior to the sale of the right of burial, and they contend, therefore, that they can disregard the sales. On this point, I was desirous of reading the evidence. The Plaintiffs admit, that the mortgage was made to Mr. *Tudor* on the re-establishment of the chapel and the purchase of the ground in 1831, two years prior, I think, to the earliest of these sales, and many years prior to several other sales. But the Plaintiffs allege, that Mr. *Tudor* was paid off lately, by an arrangement, by which he consented to accept 3,000*l.* in lieu of all demands; that this money was raised and paid to him, and that thereupon he assigned his mortgage to the Defendants; and, consequently, that the Defendants are not mortgagees, but

but are holders, by assignment, of the mortgage in trust for the trustees of the chapel, and that, in fact, they are the trustees of the chapel, if not actually, at least in substance and effect. This allegation is confirmed by evidence of the public statement of the minister of the chapel, at a meeting of the shareholders and members of the congregation, and it is not denied by the Defendants. I must, therefore, on this application, which is for an interlocutory injunction to preserve the right until the hearing, say, that, on this evidence, the Defendants stand in the place of, and, for all practical purposes, in the present stage of the suit represent, the trustees of the chapel, that is the persons who, being the holders in trust of this ground, have contracted to the effect specified in the documents above referred to :—that the Plaintiffs shall have and be protected in a perpetual right of burial in particular spots on this ground. I think, therefore, that it is clear, that if the case rested here, the Plaintiffs would be entitled to have an injunction, to prevent any further acts being done, to destroy or deface their family vaults or affect their right of burial, until the hearing of the cause, when the Court will finally adjudicate upon the rights of all parties.

The Defendants, however, in answer to this, say, that by the Statute of the 15th and 16th of the Queen, chapter 55, the right of burial in this ground is put an end to, and that no further interments can take place. The conclusive answer to this appears to me to be, that, by the 6th section of that Act, the Secretary of State for the Home Department is empowered, in cases of private right, to permit burials in family vaults, notwithstanding the ground has been discontinued to be used for burial purposes generally.

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Now it is obvious, that if these vaults were filled in, and the traces of them in the ground destroyed, this right could not be exercised, even if the Secretary of State should consent. I am of opinion, therefore, that the five Plaintiffs are entitled to have the family vaults which belong to them preserved, and the spot in which they are situated kept undefaced and unobliterated.

It is however alleged, that in fact, the evil complained of is already completed, and that this Court would not grant any injunction, however clear the original right might be, if the trespass be complete and perfect, and *Deere v. Guest* (a) may be cited as an instance. This is, in my opinion, undoubtedly true; but on reading the evidence on this subject, I find considerable difficulty in ascertaining what are the real facts relative to the state of these graves, and as I am not bound to grant any mandatory injunction, upon the present occasion, to compel the Defendants to reinstate them in the situation in which they were before, I think that the Plaintiffs are entitled to such an injunction as will preserve their property, in its present actual state, until the hearing of the cause.

I shall therefore grant an injunction to restrain the Defendants, their workmen, servants and agents, from injuring, defacing and obliterating the graves in the burial ground of the Plaintiffs or any of them, and from removing any of the gravestones belonging to or forming part thereof. The wording of the order may be put in any form necessary to preserve them in their present state. This order will not, however, in the slightest degree, prevent the Defendants from making such use of the rest of the burial ground as they may be advised to be fit

(a) 1 *Myl. & Craig.* 516.

fit and proper, with regard to the existing circumstances of the case. The rights of the Plaintiffs do not extend to or, in my opinion, affect this part of the ground ; they have nothing to do therewith. It is admitted that they have no legal right, and their equitable rights being confined to a right of burial in a particular spot, whenever the Secretary of State for the Home Department shall think fit to give such leave.

The *Master of the Rolls* next recommended that Mr. Richardson and Messrs. Harmer should be dismissed, and proceeded thus :—

Then, I think, it would also be very desirable (but that is a matter entirely for the parties to consider), that some arrangement should be made between them, which would make it unnecessary to bring this suit to a hearing. As far as I can understand, there has certainly been no violation of the graves, indecent disinterment, or the like ; on the contrary, there seems to have been a perfect desire to avoid everything of that description; but it can hardly be a useful thing, either to the neighbourhood or a respect to the bodies of deceased persons who have been interred there, to preserve this as a mere decaying and offensive burial ground. I merely throw this out as a suggestion from the Court for the parties to consider, whether some arrangement cannot be made, which may be satisfactory to all of them, and so avoid the necessary expense of bringing this suit to a final hearing.

At present I must grant the injunction as I have stated.

NOTE.—On the cause coming on for hearing, the Master of the Rolls adhered to his former opinion. 5th June, 1857. See *post*.

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In a partnership which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty-one years of premises to be used for partnership purposes, so as to bind the other partners. *Semble.*

Three partners agreed, by parol, for a lease of some premises. They entered and paid the rent. *A. B.*, one of the partners, two years afterwards, signed a contract for a lease on behalf of the firm. Possession was continued and rent paid until a dissolution. The Court, under the circumstances,

inferred, that *A. B.* had authority to sign the contract, though it was denied by the other partners, and made a decree for specific performance against them.

Delay and laches, on the part of the Plaintiff, are a good defence to a suit for specific performance, but they are inapplicable where the contract, though incomplete, has continued to be acted on; as where, under a contract for a lease, possession is taken and rent paid for a series of years.

SHARP *v.* MILLIGAN.

IN the year 1841, *Walter Milligan* and *Thomas Jowett*, who had previously carried on business in partnership as manufacturers at *Bingley*, took *Robert Milligan* into partnership. They carried it on under the firm of *Milligan, Jowett & Co.* In 1841, they entered into a parol agreement with *Sharp*, the owner, for a lease of a mill and factory, for the purposes of their business. The terms of this agreement were disputed, the Plaintiff alleging that it was for twenty-one years, determinable at the end of ten, and the Defendants alleging that it was for ten years, extendible to twenty-one.

No agreement or lease was then signed, but the partners entered into possession and carried on the business on the premises.

An agreement, dated the 6th of *October*, 1843, was afterwards prepared, purporting to be made by *Sharp* of the one part, and the three partners of the other, whereby *Sharp* agreed to execute to the partners, who agreed to accept, a lease of the mill, &c., with the machinery, &c., from the 1st of *May*, 1841, for twenty-one years



years, determinable at the end of ten years, at the option of the lessees, at a rent of 250*l.*

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This agreement was signed by *Jowett* in the name of "*Milligan, Jowett & Co.*," but it was not signed by the *Milligans*, who positively denied that they had ever authorized *Jowett* to sign it on their behalf.

The partners continued in possession and to pay the rent until 1847, when the partnership was dissolved.

Jowett retained possession and paid the rent until November, 1854, but he neglected to pay the rent which became due in May, 1855, and he became bankrupt in the same month.

This bill was filed on the 27th of July, 1855, by the representatives of *Sharp* (who had died in 1851) against the three partners, for a specific performance of the agreement of the 6th of October, 1843. *Jowett* died pending the suit.

It was alleged that notice had been given in 1849 to determine the tenancy, but the Court held the contrary.

Mr. R. Palmer and Mr. J. T. Humphry, for the Plaintiffs. The contract is binding on all the partners, it was signed by *Jowett* on behalf of the firm, and each partner may bind the firm in relation to all partnership business; *Sandilands v. Marsh* (a), *Collyer* on Partnership (b). Here *Jowett* had authority to bind his partners, there had been a previous parol agreement with all the partners, and possession had been taken and rent paid under it. This agreement was afterwards reduced

(a) 2 Barn. & Ald. 673. (b) Page 291.

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reduced into writing and signed by *Jowett* on behalf of the firm, it was afterwards adopted by the other partners, and possession was retained and the rent paid under it.

Secondly. The contract has never been determined by notice or otherwise.

Mr. *Selwyn* and Mr. *Dury*, *contrā*. The *Milligans* are not liable. There is no contract binding on these Defendants, for the signature of a contract for a term of years is not within the scope of the ordinary powers of a partner, and no special authority has been proved. The partners have been in possession, not under the agreement, but under the parol contract, as tenants from year to year.

Secondly. If any binding contract existed, it has been determined by notice, or has been abandoned by the lessor himself.

Thirdly. Specific performance is a matter of discretion, and the Plaintiffs' remedy is barred by lapse of time. The bill was not filed until fourteen years after the contract and eight years after the *Milligans* ceased to be in possession or pay rent.

Heaphy v. Hill (a), *Southcomb v. Bishop of Exeter* (b), *Chesterman v. Mann* (c), *Walters v. Northern Coal Mining Company* (d), *Sneesly v. Thorne* (e).

The Master of the Rolls. I will consider the case.

The

(a) 2 *Sim. & St.* 29.
 (b) 6 *Hare*, 213.
 (c) 9 *Hare*, 206.

(d) 5 *De Ger, M. & G.* 629.
 (e) 1 *Jurist (N.S.)*, 1058.

The Master of the Rolls.

This is a bill for the specific performance of an agreement as old as the 6th of *October*, 1843, for a lease for twenty-one years, from the 1st of *May*, 1841, with an option to terminate it by giving two years' notice at the end of ten years. The original lessor and *Jowett*, one of the original lessees, are dead, and the question against the two surviving partners is, whether they are liable in respect of this agreement.

The first important thing to be considered is the original liability. The state of the case is this:—the property was a mill belonging to *Sharp*; the two Defendants were carrying on business with *Jowett*, and the mill being required for partnership purposes, they entered into a parol agreement with the lessor to take these premises for ten years. The Defendants themselves state a parol agreement to this effect, which was to be followed by a written agreement, but they do not agree that the parol agreement was to the full extent of the written contract afterwards signed. It appears to me important that the Defendants themselves were aware that a parol contract had been entered into and matured into a written one, by which there was to be a lease, though for what term they do not quite agree. After they had been in possession for something more than two years, a memorandum of agreement was drawn up, bearing date the 8th of *October*, 1843, which was signed by Mr. *Jowett*, but in the name of the firm of *Jowett, Milligan & Co.*, and the first question is, whether he had authority to enter into such a lease. I do not think it necessary to decide this point, but I am disposed to concur in the argument, that where partners simply enter into an agreement to carry on a partnership of which the term is not fixed, one of those partners would

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not have authority, within the scope of the partnership contract, to take a lease for twenty-one years, and to bind the other partners. But the case is totally changed when partners have taken possession of the property under a parol contract entered into by all, which, according to their own statement, was extremely analogous to the subsequent written contract; and further, when I find that the written contract was signed after they had been in possession, by one of the partners on behalf of all. I should infer, from these circumstances, that it was within the scope of the authority of one of them, to enter into an arrangement to that effect, so as to bind the whole three.

But the case does not end there, because it is obvious, from the whole of the dealings and transactions, that these Defendants were perfectly well aware that such a memorandum of agreement had been entered into. In the first place, they no where deny that it had been entered into, or that they knew of this agreement.

The next thing (which is very strong in this case) is this:—that, on the dissolution of partnership, the whole conduct of the *Milligans* is consistent with such a memorandum of agreement having been executed, and is consistent with no other view of the case. And the evidence on this point is to be read with the reflection, that they have the advantage of being the only persons who can speak to what took place at that time, because Mr. *Sharp* is dead. They say, that on this occasion, they went to Mr. *Sharp* and stated to him, "that Mr. *Jowett* would be his tenant for the future," on which (according to their own statement), he said, "I hold you all to be my tenants;" upon which they said, "no, he will be the only tenant;" and there the matter ended. It is not too much to say, you must always treat the evidence of parties



parties interested as given in the most favourable manner for themselves; but without looking at this evidence in that manner, it amounts to nothing more than an allegation on the part of Mr. *Sharp*, that he would look to them as his tenants, and on their part a repudiation that they were to be his tenants: there is the statement on both sides, the one asserting that they were liable, and the other asserting that they were not, and that Mr. *Jowett* would be alone liable.

They do not act, on that occasion, as tenants from year to year, because it would be necessary for a tenant from year to year to give six months' notice, determinable at the period at which the tenancy commenced. It is not pretended that such a course was adopted, but they seem to have acted as if they could have got rid of their liability by disposing of it to Mr. *Jowett*.

The document, signed on the dissolution of partnership, confirms the same view of the case. It appears that besides this, there were two other mills and premises which Mr. *Jowett* took; and the clause in the deed states, that Mr. *Jowett* is to have all the benefits and bear all the liabilities in respect of these premises. With respect to the other two, it is admitted, or stated at least, that written documents existed which gave him certain rights and imposed on him certain liabilities; why is it not to be supposed, as they were all treated alike, that they were perfectly aware that they were all exactly in the same condition, that is to say, that there was a written document affecting the one as well as affecting the others.

I am of opinion, therefore, that the original memorandum of agreement was binding on these Defendants; that they were aware of it at the time; that Mr. *Jowett* had

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had authority to enter into it, having regard to the circumstances of the case; and that they have done nothing whatever to repudiate it, or to explain to the lessor, Mr. *Sharp*, that they did not consider themselves bound by that document. Their statement, that Mr. *Jowett* would be the tenant for the future, is consistent with their being originally bound by it, and inconsistent with their having repudiated Mr. *Jowett's* authority to bind them by the execution of that document.

The next question is, whether the agreement has been determined. A notice to determine is always treated in this Court with strictness, and I have come to the conclusion that no sufficient notice to determine the tenancy has been given in this case.

Having come to the conclusion, that this was a good memorandum of agreement, and that it was not determined by this notice, the next question, and the only question of any importance, is, whether the delay in instituting the suit precludes the Plaintiff from maintaining it. I certainly have always acted on the principle of *Heaphy v. Hill* (*a*), and *Southcomb v. The Bishop of Exeter* (*b*), which determine, that no person is at liberty to hold an agreement for a purchase hanging over another's head for a great length of time and then to bring it forward. But those cases do not apply to the present. In those cases, there was a contract entered into, which had not, for a long period, been acted on at all, and after a considerable lapse of time, one of the parties to the contract sought to obtain the benefit of it, and enforce it against the other, on which this Court said, you must come speedily for a specific performance, or not at all.

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(*a*) 2 *Sim. & St.* 29.(*b*) 6 *Hare*, 213.

It appears to me extremely difficult to apply that principle to this case. Suppose the simple case of a landlord entering into a contract to let a farm or a mill to a tenant for twenty-one years, and they proceed upon this footing :—the tenant takes possession and pays the rent annually, from year to year, for a period equal to that which has taken place on the present occasion, which, I think, amounts to something like thirteen or fourteen years, and then the tenant refuses to pay any more. It is obvious, on that simple statement of the case, that the landlord then coming for specific performance of the contract, that is, to enforce the execution of the lease, could not be said to have been sleeping upon his rights for thirteen years, because the parties have been relying upon their equitable rights, without thinking it necessary to have their legal rights perfected. Is this a case of that description or not? If it is, then the memorandum of agreement has been acted upon until the year 1854, when Mr. *Jowett* became a bankrupt, and it is only from that time that any delay can be imputed to the Plaintiff: but after that time the bill is filed within two months of the first arrear in the payment of the rent. The rent was very regularly paid up to that time, and it was quite sufficient for the lessor if one of the lessees in possession paid the rent. He might well say, I do not wish to put you to the expense of a lease, provided the rent is paid during the whole of the time. I see nothing to make it necessary for the landlord to come for the execution of the lease until the rent ceased to be paid.

I think, therefore, that this is a case in which the Plaintiff is entitled to a decree for specific performance, and the result must be a reference to me at Chambers to settle the terms of the lease, in case the parties differ about the same.

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BLACKBURN v. CAINE.

Feb. 19, 21.

A foreclosure was decreed, in default of payment to three mortgagees, who were entitled "on a joint account." Before the day appointed for payment arrived, one of the mortgagees died. Held, that the foreclosure could not be made absolute, but the Court appointed a new day for payment to the survivors.

THIS was a foreclosure suit instituted by three mortgagees, *Blackburn, Trotman and Grant*, who were declared, by the deed, to be mortgagees on a joint account. The decree ordered, that in default of payment to the Plaintiffs, within six months after the Chief Clerk's certificate, the Defendant should be foreclosed. The certificate was dated the 30th of *July*, 1855, and the amount made payable at the Rolls on the 30th of *January*, 1856.

In the meantime, *Blackburn* died in *November*, 1855.

Default was made in payment.

Mr. *Baggalay* applied for an order absolute.

The MASTER of the ROLLS considered that the order absolute could not now be made; for, by the death of one of the parties, a compliance with the order for payment to the three Plaintiffs had now become impossible. He, however, fixed a new day for payment to the two survivors.

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BY the original bill, Mrs. *Allen* alleged, that *Thomas Groom* died intestate in 1807, seised in fee simple of a cottage, &c., subject to a mortgage for 100*l.*, leaving the Plaintiff and two others his co-heiresses. That the mortgage had become vested in the Defendant *Batchelar*, who having entered into possession "as assignee of the mortgage, and under no other title," had fully satisfied his debt out of the rents, and was indebted to the Plaintiff and the other persons entitled thereto in the overplus of the rents. It prayed for accounts, repayment and a reconveyance.

The Defendant *Batchelar* put in his answer, stating that the mortgage had been long since paid off, and that the property had been absolutely conveyed to him, by the Plaintiff and the other co-heirs, by lease and release of the 15th and 16th *November*, 1825, by a fine, and by a surrender, by the same parties, on the 25th of *July*, 1832, of the copyhold part.

The Plaintiff afterwards amended her title, stating the conveyances as claimed by *Batchelar*, and charging that the lease and release were never executed by the Plaintiffs and were forgeries; and that, "in case any such alleged fine was ever levied or acknowledged in her name, by any person purporting to be the Plaintiff, then such person fraudulently personated the Plaintiff; and in case any such alleged surrender was ever made in her name, by any person purporting to be the Plaintiff,

The original bill sought relief against the Defendant, as mortgagee in possession. The Defendant, by his answer, claimed under a conveyance from the Plaintiff. By amendment, the Plaintiff, abandoning the relief under the mortgage title, sought to avoid the conveyance. A motion by the Defendant, that the amended bill might be taken off the file, or that the Plaintiff might pay the costs up to the amendment, was refused.

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tiff, then such person fraudulently personated the Plaintiff."

The amended bill prayed a declaration that the conveyances were forgeries, and that the fine and surrender were fraudulent and void. It also prayed for a reconveyance of the premises, for an account of the rents, for the delivery of the title deed, and a surrender of the copyholds.

The Defendant *Batchelar* now moved, that the Plaintiff's amended bill might be ordered to be taken off the file, or that the Plaintiffs might be ordered to pay the Defendant the costs of suit up to the amendment, and the costs of the motion, and that the proceedings might be stayed in the meanwhile.

Mr. *Roupell* and Mr. *Surrage*, in support of the motion, argued, that the amendments exceeded the legitimate limits allowed by the practice of the Court; for the whole of the relief sought by the original bill had been abandoned, and the amended bill proceeded on a totally different equity. The original bill proceeded on a mortgage title, and asked redemption, while the amended bill was to set aside a conveyance. They relied on *Smith v. Smith* (a), in which it was decided, that a "Plaintiff not entitled upon paying the common costs of amendments to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage after an issue against the Plaintiff, finding him a mortgagee."

So in *Mavor v. Dry* (b), the "Plaintiff, by his original bill, sought to set aside a deed. After the answer was filed,

(a) *Sir Geo. Cooper*, 141.

(b) *2 Sim. & St.* 113.

filed, he, under the usual order, amended the bill by making quite a different case, and sought to establish the deed. The Court ordered him to pay the costs of the original bill and of certain accounts set forth in the answer in compliance with the prayer of that bill, and the costs of the motion."

The MASTER of the ROLLS, without hearing the other side, said, I cannot grant this motion, which is quite contrary to my experience of the practice of the Court. It is a matter which can more properly and conveniently be dealt with at the hearing of the cause.

The rule is, that a Plaintiff cannot file a bill for one purpose, and then, by amendment, convert it into a bill for an opposite purpose. Thus, a person cannot file a bill to set aside a deed, and then, by amendment, turn it into a bill to execute the trusts of the same deed. But it would be extremely dangerous to lay down, that the Court must examine whether, by amendment, the case has been materially or substantially, or completely varied. In many cases, the Plaintiff, though right, is ignorant of his rights; and it has frequently occurred, that fishing bills have had the effect of shewing that the Plaintiff has a substantial equity, but which he has only been able to ascertain from the discovery given by the answer.

Here is a bill for an account against a person in possession of the property, alleging that he is in possession as mortgagee, and asking that the accounts may be taken of what, if anything, is due to him, but saying that he has been wholly paid off, and, in fact, holds the property as a trustee for the Plaintiff.

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The Defendant puts in an answer, by which he says, the mortgage has been paid off; but that he holds the property as absolute owner under conveyances from the Plaintiff and the other co-heirs. On this, the Plaintiff amends her bill, and asks an account and delivery of the property; she still alleges, that the Defendant is in possession, but in another way, viz., under a deed which is fraudulent and void. I must deal with this when the evidence is before me; but assuming, as I am obliged to do on this occasion, that the facts are correctly stated, and that they can be proved, I am of opinion, that this is not a case in which the Plaintiff, wholly ignorant of the title of the Defendant, is precluded from so altering the bill, or that she cannot do so without paying the whole of the costs already incurred.

I will reserve the question of costs to the hearing.

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NOTE.—See the following cases:—*Bullock v. Perkins*, 1 *Dickens*, 110; *Dent v. Wardel*, 1 *Dickens*, 339; *Earl of Masserene v. Lyndon*, 2 *B. C. C.* 291; *Strickland v. Strickland*, 3 *Beau.* 242; *Peed v. Cussen*, 1 *Sause & S.* 161; *Potter v. Waller*, 2 *De G. & Sm.* 418; *Mounsey v. Burnham*, 1 *Hare*, 22; *Watts v. Manning*, 1 *Sim. & St.* 421; *Monck v. The Earl of Tankerville*, 10 *Sin.* 284; *Hardingham v. Thomas*, 2 *Drew.* 353; *Delawney v. Delawney*, 4 *L. J. (N. S.) Ch.* 50.

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## GILLY v. BURLEY.

*July 15.*

**M**R. and Mrs. *Gilly* intermarried in 1825. By the settlement made previous to their marriage, after reciting that it had been agreed that Mr. *Gilly* "should effect an insurance on his life, in the *Rock Insurance Office*, in the city of *London*, for the sum of 2,500*l.*, in the names of" the two trustees, and that the said Mr. *Gilly* "should enter into the covenant thereinafter contained for payment of the annual premiums for keeping the said insurance on foot, and that such trusts as were thereinafter mentioned should be declared of the sum of 2,500*l.* so to be insured," and reciting that the insurance had that day been effected in the names of the two trustees, it was witnessed, that "for declaring the trusts of the sum of 2,500*l.* to become due and payable to the" said trustees, upon the decease of Mr. *Gilly*, "under and by virtue of the said insurance," it was thereby agreed, that the trustees should stand and be possessed of the said sum of 2,500*l.*, and every part thereof, upon trust for Mrs. *Gilly* for life, with remainder to Mr. *Gilly* for life, with remainder to their children. And Mr. *Gilly* covenanted to pay, from time to time, the annual premiums, "which should from time to time become due and payable for keeping the said insurance on foot."

Bonuses on a policy held to be subject to the trusts of a marriage settlement.

Upon the construction of a settlement, it was held, that a policy effected in the names of trustees was itself settled; but that, under the covenant of the husband and the rules of the company, the husband was entitled to an option to have any bonus applied in reduction of the premiums. Bonuses having been declared, the husband continued to pay the full premiums, and it was held, on his death, that the bonuses were accretions to the trust, and did not belong to his executors.

Prior to the marriage, Mr. *Gilly* had made a proposal to the office which had been accepted, but no policy had been executed until 1826, when it was made out in his own name, and not in that of the two trustees.

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A new trustee was appointed in 1838, and by the deed, to which Mr. *Gilly* was a party, it was recited that the trust funds consisted of certain consols and the "policy of insurance," and it was declared, that the trustees should stand possessed of the Consols, "and the said policy of insurance for 2,500*l.* so intended to be transferred," upon the trusts of the settlement.

Mr. *Gilly* died in 1855, at which time, by bonuses, the policy had increased by 1,222*l.*, and the question was, whether this addition was subject to the trusts of the settlement.

By the rules of the *Rock Company*, persons holding policies were entitled to elect in which of the three ways every *bonus* should be paid or applied, which were as follows :—1st. By the payment, at the time, of the bonus to the holder of the policy ; or 2nd, by a deduction from the amount of the future annual premiums ; or 3rd, by the addition of the amount to the insurance.

No option appeared to have been exercised.

Mr. *Selwyn* and Mr. *Surrage*, for the Plaintiffs, the executors of Mr. *Gilly*, contended that the 1,222*l.* formed part of the estate of Mr. *Gilly*, for he had contracted only for a settlement of 2,500*l.*, for which the policy was a security, and no trusts were declared of anything beyond that amount. That, as he had the option of requiring the bonuses to be applied in diminution of the premiums, and as it was his interest so to do, it must be assumed that the accretions belonged to him, and that the sum of 1,222*l.*, which had been produced by the payment of an excess of annual premiums, belonged to the person whose estate had paid for it.

Mr.



Mr. G. L. Russell for the Defendants. By the contract, the policy was to be effected in the names of the trustees, and Mr. *Gilly* was under an obligation to pay the premiums to keep it up. The whole benefit of the policy would, therefore, have vested in the trustees, if the policy had been effected in their names; they were, consequently, entitled to the policy and to the whole fruits of it. The fact of the policy having been effected in the name of Mr. *Gilly* cannot alter the rights of the parties, and neither he nor his executors can take advantage of his own default. By the form of the deed, the insurance was to be effected, kept up and settled, and there is no declaration of trust of any surplus in favour of Mr. *Gilly*. He cited *Parkes v. Bott* (a).

The Master of the Rolls reserved judgment.

The Master of the Rolls.

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The short question in this case depends on what is the construction of the settlement, and whether the executors of the husband, or the trustees of the settlement, are entitled to the bonuses declared on a policy effected on his marriage.

The settlement recites, that it had been agreed that the husband should effect an insurance on his life for 2,500*l.* in the names of the trustees (I think that is a very material circumstance), and that he should enter into a covenant for payment of the annual premiums for keeping the said insurance on foot, and that such trusts as thereafter mentioned should be declared. It recites that

(a) 9 *Simons*, 388.

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that the insurance had been effected in the names of the trustees (which was incorrect), and it goes on in these words :—" And for declaring," &c. [see *ante*, p. 619.]

Upon this it was argued, for the executors of the husband, that, in effect, this was nothing more than a settlement of a sum of 2,500*l.*, which was to be secured by a policy, and that this was proved by nothing being said except as to the 2,500*l.* secured by the policy ; and that in no part of the settlement are the words "the policy," or "the money secured by policy," or anything tantamount to it to be found. It is also pointed out, that the covenant is not to pay the whole premiums, but to pay the premiums "from time to time due and payable for keeping the said insurance on foot."

On the other hand, it was argued, for the trustees of the settlement, that this was a deed to settle the policy for 2,500*l.* and all that it might produce ; that it was not merely a covenant to secure that amount, but that the policy is to be vested in the trustees, and, that the whole being in the hands of the trustees, the accretions will follow the trust.

On considering the settlement and the arguments of Counsel, I think this was a deed to settle the policy and not the sum of money. I concur that it was only a policy of 2,500*l.*, which the husband was bound to keep on foot, and that if he had thought fit, he might have caused the bonuses to go in reduction of the premiums, and have paid the reduced annual premiums necessary to keep the policy for 2,500*l.* on foot : he would have been justified in doing so. It was important that the policy was to be effected in the names of the trustees, but

but nothing turns on the fact of it having been originally in the name of the husband. I think the case should be treated exactly as if the husband had performed his covenant, and the policy had been effected in the names of the trustees, its being effected in his name was irregular in form, but in substance it is to be treated as if it had been effected in the name of trustees. The trustees being owners of the policy, which would carry all the bonuses with it, they become owners of the bonuses. The husband had the option of saying, "in future I will pay diminished premiums, so as to keep up an insurance of 2,500*l.* and no more," but he has not thought fit to do so; what he has done, has been to add to the fund of the settlement.

I am of opinion, that the bonuses belong to and form part of the moneys secured by the policy, and that the settlement affects the whole of them equally. I attach no importance to the fact, that the executors have what may be called the legal estate in the policy. They get it only by reason of the husband not having performed his covenants in form, although he did in substance, by effecting the policy in the name of the trustees. If it had been so effected, the executors would now be claiming the bonuses against the trustees. At law, the executors would have had no title, and in equity, I think, they have none, although the husband might have obtained the benefit of these bonuses in the way I have stated; but he has not thought fit, or apparently desired to do so. This is confirmed by what took place in 1838, when he appointed new trustees, and transferred the policy to them by deed, and declared that they should stand and be possessed of the policy itself upon the trusts of the settlement, and, in fact, transferred the money secured by the policy, which, I assume, included a part of the

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bonuses which had been declared on the policy at the time.

If the option was not exercised by the husband, it follows, that the bonuses went with the rest of the moneys secured by the policy, and were subject to the same trusts. He never exercised this option, but he has done more, he has executed a deed which seems to express, that he intended not to exercise it. I am of opinion, that the bonuses follow the capital, and belong to the trustees, and are subject to the trusts of the settlement.

NOTE.—On questions of the right to *bonuses* and *accretions*, the following authorities may be referred to:—*Brandor v. Brandor*, 4 *Ves.* 800; *Puris v. Paris*, 10 *Ves.* 185; *Wilts v. Steere*, 13 *Ves.* 363; *Barclay v. Wainwright*, 14 *Ves.* 66; *Norris v. Harrison*, 2 *Mad.* 268; *Courtney v. Ferrers*, 1 *Sim.* 137; *Ward v. Combe*, 7 *Sim* 634; *Parkes v. Bolt*, 9 *Sim.* 388; *Vaughan v. Wood*, 1 *Myl. & K.* 403; *Simpson v. Mountain*, 4 *Law J., N. S. (Ch.)* 221; *Price v. Anderson*, 15 *Sim.* 473; *Johnson v. Johnson*, 15 *Jurist*, 714; *Plunkett v. Mansfield*, 2 *Jones & Lat.* 344; *Domville v. Lamb*, *V. C. Wood*, 9 *March*, 1853; *Cumming v. Boswell*, *L. C.* 15 *July*, 1856.

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GREEN v. LOW.

THE Defendant, *Low*, was owner of a plot of ground at *Wimbledon*.

On the 23rd of *December*, 1854, an agreement was signed between the Plaintiff of the one part and the Defendant, *Low*, of the other part, whereby the Plaintiff agreed to build a villa, &c., of the value of 1,000*l.*, on the ground, and he agreed to insure, and keep it insured, *in the joint names of himself and the Defendant*, *in the County Fire Office* for 900*l.* The Defendant agreed, as soon as the house should be completed, to grant the Plaintiff a lease for ninety-nine years, at a rent of 25*l.*

"It was also agreed, that if the Plaintiff should not fully perform the agreement on his part, then the agreement on the part of the Defendant, for executing the said lease, should be void, and immediately thereupon, or at any time thereafter, it should be lawful for the Defendant to re-enter and take possession of the premises."

The agreement contained the following stipulation:— "And the landlord (meaning the Defendant) further agrees, that he will, if required, within two years after the date of this agreement, sell to him, the tenant, (meaning the Plaintiff), the fee simple of the plot of ground and premises hereby agreed to be demised, free from rent and all incumbrances, at the price of 500*l.*, and on payment of such purchase-money, he, the landlord, his heirs or assigns, will duly convey the same to

June 25, 26.

The owner of a plot of ground agreed to grant a lease of it to *A. B.* as soon as the latter had erected a villa thereon. But it was stipulated, that if *A. B.* should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. *A. B.* was to insure in a particular way, and he was to have the option of purchasing the fee within two years. *A. B.* erected the villa, but insured in the wrong office and in the wrong name. Held, that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed.

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the tenant, his heirs and assigns, or as he or they shall direct."

The Plaintiff accordingly erected the villa, and he insured it for 1,000*l.* in the *Royal Exchange Insurance Office*, and not in the County Fire Office, and in his own name instead of in the joint names of himself and the Defendant.

No lease had been granted, but the Plaintiff, within the period limited (13th Feb. 1856), gave the defendant notice of his intention to purchase the fee simple of the property, and he tendered the purchase-money and a conveyance.

The Defendant refused to convey the property, insisting that the agreement had become void, by reason of the Plaintiff's neglect to insure, in the mode stipulated.

The Defendant commenced proceedings at law to recover possession, and the Plaintiff then filed this bill for a specific performance of the contract to sell the property.

Mr. *Lloyd* and Mr. *Smythe*, for the Plaintiff, contended, that the right to purchase was independent of the right to have a lease of the property, and that, even if the right to the latter had been forfeited, by the mere accident of insuring in the wrong office and in the Plaintiff's name alone, still that the right to purchase remained unaffected.

Mr. *Southgate*, contra, for the Defendant, insisted, that, by the breach of the engagement to insure, the whole

whole contract had been put an end to. He cited *Thompson v. Guyon (a)*.

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The Master of the Rolls held, upon the construction of the contract, that the right to purchase was independent of the right to a lease, and he decreed a specific performance with costs, and awarded a perpetual injunction to restrain the Defendant's proceedings at law.

(a) 5 *Simons*, 65.

GARNER v. HANNYNGTON.

July 17.

BY his will, dated in 1830, the testator devised two freehold houses in *New Street, Covent Garden*, to his wife for life; "and all other his real and personal estate, whatsoever and wheresoever, he gave and bequeathed to her in perpetuity." And from and immediately after the decease of his wife, he gave the two houses to the Plaintiff *Elizabeth Garner* for life, with remainder over in favour of charities, which were admitted to be void under the Mortmain Act.

The legal tenant for life is entitled to the custody of the title deeds, and they will not be ordered to be deposited in Court, merely because the tenant for life is heir at law, and claims the immediate reversion against the residuary devisee.

The testator died in 1840, and his wife died in 1854. The Defendant, her residuary devisee and executrix, had possession of the title deeds of the two houses, which she refused to deliver up to the Plaintiff, the tenant for life.

The Plaintiff, alleging herself to be heiress at law of the testator, filed this bill for the delivery up of these title deeds.

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 v.
 HANNYNGTON. The Defendant set up a title to the two houses in remainder, subject to the life estate of the Plaintiff, as residuary devisee of the widow, insisting that the reversion of the two houses passed to the widow under the residuary devise in the testator's will, and under her will to the Defendant.

Mr. R. Palmer and **Mr. Southgate**, for the Plaintiff. The Plaintiff, as tenant for life, is entitled to the custody of the title deeds; *Davis v. Earl of Dysart* (*a*). But, besides this, as the new Statute of Wills does not apply to the testator's will, which was made prior to 1838, the reversion in fee in the two houses, the devise of which to charities was void under the Mortmain Act, did not pass under the residuary devise to the widow; *1 Jarman on Wills* (*b*); *Upjohn v. Upjohn* (*c*); but descended on the heir at law. Therefore the Plaintiff is entitled to the fee, and has an undoubted right to the muniments of title.

Mr. Lloyd and **Mr. Alexander Gordon, contrā**. First, the Plaintiff has not made out her pedigree as heir of the testator. Secondly, the reversion in fee passed to the widow under the residuary devise, for the devise of the two houses to charity was altogether void under the Mortmain Act, and it may be considered as omitted from the will; *Doe d. Stewart v. Sheffield* (*d*); *Williams v. Goodtitle* (*e*). Thirdly, the Plaintiff, being merely tenant for life, is not, under the circumstances, entitled to the custody of the title deeds. They belong to all persons interested in the estate, and ought to be deposited in Court for safe custody until the rights of the parties have

(*a*) 20 *Bear.* 405.

(*d*) 13 *East*, 527.

(*b*) Page 548, 2nd edit.

(*e*) 10 *Barn. & Cr.* 895.

(*c*) 7 *Beav.* 59.

have been determined. Remaindermen are entitled to have an inspection and copies of the title deeds to the estate, but the tenant for life is not, universally, entitled to their custody. *Storey* (a) says, "remaindermen and reversioners, and other persons having limited interests in real estate, have a right, in many cases, to come into equity to have the title deeds secured for their benefit;" and for that position he cites *Smith v. Cooke* (b); *Banbury v. Briscoe* (c); *Ivie v. Ivie* (d); *Lempster v. Pomfret* (e); *Freeman v. Fairlie* (f). In *Ivie v. Ivie* (g), Lord *Hardwicke* "agreed this [viz. depositing the deeds in Court] to be the common practice, in the case of a remainderman whose interest was expectant on a mere tenancy for life," and he drew the distinction in that case, that the Plaintiff's interest was too remote, and that the first tenant for life was not the heir at law. Here the Plaintiff claims as heir, and the Defendant's interest is immediate and vested. In *Pyncent v. Pyncent* (h), Lord *Hardwicke* intimates, that the deposit has been ordered, "where the remainderman is a stranger to the tenant for life. This is the present case. Again, in *Smith v. Cooke* (i), Lord *Hardwicke* is still more explicit. He says, "there are a great many cases, where a remainderman in tail or a reversioner in fee, may come into this Court to have the title deeds secured for their benefit, though an estate for life is standing out." Here the right to the reversion in fee is in dispute between the Plaintiff and the Defendant. The Plaintiff claims to be heir, and the Defendant is a stranger to the Plaintiff, and therefore the authorities cited are applicable to the present case.

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| (a) 2 <i>Eq. Juris.</i> 14, s. 704. | <i>Jurisprudence</i> , 469. |
| (b) 3 <i>Atk.</i> 382. | (f) 3 <i>Mer.</i> 30. |
| (c) 2 <i>Ch. Cas.</i> 42. | (g) 1 <i>Atk.</i> 430. |
| (d) 1 <i>Atkins</i> , 431. | (h) 3 <i>Atk.</i> 570. |
| (e) <i>Ambler</i> , 154; <i>Jeremy, Eq.</i> | (i) <i>Ibid.</i> 381. |

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The MASTER of the ROLLS (without hearing a reply).

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HANNINGTON. The legal tenant for life is *prima facie* entitled to the custody of the title deeds. The rule is subject to some qualification; it does not apply to a case in which the legal estate is vested in trustees on particular trusts, one of which is to receive the rents and to pay them over to the tenant for life; in such a case I have held, that the trustee was entitled to the custody of the deeds. This is a case of a tenant for life of a legal estate, and I am of opinion he is entitled to the deeds.

I express no opinion as to whether the Plaintiff has or has not made out his pedigree, it does not properly arise, nor on the question as to construction of the testator's will. But the case of *Doe d. Stewart v. Sheffield*(a), if an authority, does not apply to this case, because there the words were, "property not therein-before disposed of." Here the expression is, "all other my real and personal estate whatsoever and wheresoever."

I am of opinion that the Plaintiff is entitled to the custody of the deeds, and that an order must be made for their delivery.

The costs must follow the event.

(a) 13 *Eas*, 527.

1856.

PRINGLE v. PRINGLE.

July 9.

IN 1790, *Andrew Pringle* married *Cordelia Fortnam*, an infant of the age of eighteen, in *India*.

By the settlement executed on their marriage, and made between Mr. *Pringle* of the first part, Mrs. *Pringle* of the second part, and trustees of the third part, reciting that her fortune consisted of divers sums of money, bonds, &c., in the hands of her father's executors in Chancery, it was declared, that they should be held on trust for Mr. *Pringle* for life, and in case he should die in Mrs. *Pringle's* lifetime, leaving no issue of the marriage, then on trust to permit Mrs. *Pringle* to receive the money, bonds, &c. And in case Mrs. *Pringle* should die in the life of Mr. *Pringle*, leaving issue of the marriage, then (subject to Mr. *Pringle's* life interest) on certain trusts for such issue.

On the marriage of a female infant, a settlement of her personal estate was executed, giving an interest to the issue in the event of the husband surviving his wife, but none in the contrary event. Held, that the issue could not, on the latter event, take by implication or construction. Held also, that the husband had not, by the settlement, reduced the fund into possession.

It will be observed that no provision was made for the issue of the marriage in the event of Mr. *Pringle* dying in Mrs. *Pringle's* life, leaving issue, and which event happened. But a provision was expressly made for them, in that event, out of the husband's property.

In the suit in Chancery (*Fortnam v. Horne*) the Master reported that the settlement was a proper settlement, and in 1797, an order was made to transfer the share of Mrs. *Pringle* in the funds (2,128*l.*) to the trustees of the settlement.

Mr.

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Mr. *Pringle* died in 1804, leaving four children and his wife surviving.

All the original trustees having died, three new trustees were appointed, in 1838, by Mrs. *Pringle*.

In 1842, Mrs. *Pringle* and the new trustees instituted a suit, in which a further sum (1,787*l.*) was recovered from the representatives of the original trustees, as included in the settlement.

Mrs. *Pringle* died in 1854, having received the income of the trust funds down to her death.

The executors of Mrs. *Pringle* claimed "the whole of the trust funds, upon two grounds, viz., 1st, That in the events which happened, the trust funds were undisposed of by the settlement, and therefore the absolute property of Mrs. *Pringle*; and, 2ndly, that if any trust was to be implied for the children of the marriage, such implied trust must be restricted to children who survived Mrs. *Pringle*. On the other hand, the administratrix of one of the four children contended, that in the events which happened, the whole of the trust funds were divisible in four shares among the four children of the marriage."

Mr. *R. Palmer*, for the Plaintiffs, contended that the whole fund belonged to the representatives of Mrs. *Pringle*, for it had never been reduced into possession. The settlement had been approved of by the Court, but contained no provision for children, in the event which had happened; the property being, at the time of the settlement, that of an infant, no trusts in favour of her children could be raised by implication; and that, therefore, the wife, on the death of her husband, became absolutely

absolutely entitled to the fund by survivorship. He mentioned *Ryland v. Smith* (a).

Mr. *Freeling* and Mr. *Woodhouse*, for the Defendants. There are two questions; first, whether there has been a reduction into possession; and, secondly, whether a trust in favour of the children is to be implied, in the events which have happened. As to the 1st. The fund had been reduced into the husband's possession by the settlement, or, at all events, that which has been done by the husband is equivalent to a reduction into possession; *Burnham v. Bennett* (b); *Cunningham v. Antrobus* (c); *Hansen v. Miller* (d). The intention of the settlement was to provide for the children of the marriage, and the Court will not interpret such an estate or interest to be in the parent as will deprive the children of the intended benefit; *Davies v. Davies* (e); *Simson v. Jones* (f). Secondly. Trusts for the children will be implied; and the Court will supply defects in an imperfect trust, upon consideration of all the circumstances of the case and the objects and intentions of the parties. The settlement was prepared in *India*, and was only incidently, and long after its execution, found by the Master's report to be a proper settlement. *Allin v. Crawshay* (g); *Tunstall v. Trappes* (h); *Cook v. Hutchinson* (i); *Lee v. Bush* (k), were also cited.

The MASTER of the ROLLS considered that the Plaintiffs, as representatives of Mrs. *Pringle*, the wife, were entitled to the whole fund. That there had been no sufficient reduction into possession, either by the fact of the husband being a party to the settlement, or by any act

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| (a) 1 <i>My. & Cr.</i> 53. | (g) 9 <i>Hare</i> , 382. |
| (b) 2 <i>Coll. C. C.</i> 254. | (h) 3 <i>Sim.</i> 312. |
| (c) 16 <i>Sim.</i> 436. | (i) 1 <i>Keen</i> , 42. |
| (d) 14 <i>Sim.</i> 22. | (k) 14 <i>Beav.</i> 459, and 2 <i>De G., M. & Gor.</i> 810. |
| (e) 4 <i>Beav.</i> 57. | |
| (f) 2 <i>Russ. & Myl.</i> 365. | |

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act of his subsequently. He said, that where a trustee holds a fund for the benefit of a husband, it is in the nature of a reduction into possession, but on the face of this settlement, there was no trust for the husband beyond the life estate. That this Court had thought the settlement a proper one, it must, therefore, be now assumed to be so, and could not now be reformed, either according to any intention which then existed, or according to any new doctrine of the Court.

His Honor made an order declaring the Plaintiffs entitled to the fund, as executrices of the will of Mrs. *Pringle*, being of opinion that in the events that had happened, such trust funds were not affected by the trusts of the settlement. The costs of all parties out of the fund.

June 12.

An order for the taxation of two out of four bills, and the delivery up of the papers, discharged, but without costs, the solicitor having attended the Taxing Master without having objected, and not having applied to discharge the order until six weeks after notice of it.

Re WAVELL.

THIS was a motion by a solicitor to discharge an order of course for taxation of two of his bills, which had been obtained by the client.

The solicitor had delivered four bills of costs, in respect of different matters, and on the 21st of *April*, 1856, the client obtained an order *ex parte* for the taxation of two bills, and the delivery up of the papers. On the 23rd of *April*, notice of the order was given to the solicitor, who attended the Taxing Master once, on the 8th of *May*, without taking any objection. The Master, on the 12th of *May*, certified, that three months further time was necessary to enable him to make his certificate of taxation, and the solicitor, on the 6th of

June

June and before any further attendance, gave notice of motion to discharge the order of reference.

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WAVELL.

Mr. R. Palmer and Mr. Amphlett, in support of the motion. It is irregular to obtain an order for the taxation of a portion of a solicitor's demand, and for the delivery up of the client's papers, on payment of a part only of what is due to the solicitor; *Holland v. Gwynne* (a); *In re Law* (b); *In re Pender* (c). Even in case of a dispute as to the liability, the matter ought to have been mentioned; *In re Walker* (d).

Mr. Selwyn, *contra*. As to two of the bills, the client wholly repudiates them; no part of the business comprised in them was done for him. Secondly, the solicitor has waived the irregularity, by attending the taxation; for he thereby submitted to the taxation, and adopted the order.

The MASTER of the ROLLS. The only question is as to the waiver.

Mr. R. Palmer, in reply. As to the attendance, the solicitor could not help it. He was required to attend, and if he had absented himself, the taxation would then have proceeded *ex parte*.

The same point has been decided in compensation cases, where attending before a jury is not considered as an adoption of an irregular proceeding. Leaving the order as it stands, all the papers on which the solicitor has a lien must be delivered up, though two bills remain unpaid.

The

(a) 8 Beav. 124.
(b) 21 Beav. 481.

(c) 8 Beav. 299.
(d) 14 Beav. 227.

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Re
WAVELL.

The MASTER of the ROLLS.

If the application had been made speedily, the order could not have stood. I should have discharged it with costs, for it is impossible for a client to get an order for the delivery up of the papers, upon the taxation of two out of four bills of costs. It would be manifestly unjust towards the solicitor.

Here the solicitor allowed the taxation to go on some time, before he took the objection, and, in consequence, it was necessary to get the time extended by the Master.

I am of opinion, that the order must be discharged, but, under the circumstances, without costs. I think the party moving ought to pay something towards the expenses before the Master; what they are I do not know. I will make some inquiry as to that, and if I add anything to the order, I will mention it the first day the Court meets.

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THE PRINCIPAL MATTERS.

ACCOUNT.

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ACCOUNTANT-GENERAL.

Prospective order for payment by the Accountant-General to the tenant for life of the income of funds hereafter to be paid into Court, to the same account. *In re Chamberlain.* Page 286

ADEMPTION.

1. A testator bequeathed leaseholds, subject to the payment thereout of an annuity to *A. B.* He afterwards assigned the leaseholds on other trusts, and reserved a power to appoint a like annuity to *A. B.* Subsequently, he confirmed his will, but he did not, in terms, execute his power. Held, that the annuity failed. *Cooper v. Mantell.* (No. 1.) 223

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2. An adeemed bequest is not set up again by a subsequent confirmation of the will. *Cooper v. Mantell.* (No. 1.) Page 223
3. In 1829, a testator directed his trustees to raise 5,000*l.*, out of his real estate, for his son. In 1835, on his son's marriage, he covenanted to pay, at his death, 5,000*l.* to the trustees of his son's settlement. In 1850, after referring to the legacy of 5,000*l.* to his son, he directed his trustees to raise a further sum of 7,000*l.* for his son. Held, by the Master of the Rolls and the Lords Justices that the first bequest had not been adeemed, and that the three sums of 5,000*l.*, 5,000*l.* and 7,000*l.* were payable. *Hopwood v. Hopwood.* 488

ADMISSION OF ASSETS.

1. Annuities given by a will were regularly paid by the executors for

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six years, and irregular payments, on account, were made by them for the next four years. *Semble*, that this of itself would be an admission of assets. *Payne v. Little.*

Page 69

2. This Court does not bind executors by an admission of assets, if new claims on the estate afterwards arise. *Ibid.*
3. Payments to legatees, made under a decree in a legatee's suit, cannot be allowed, as against creditors, if made without having the accounts taken, and therefore as upon an admission of assets. *The Official Managers of the Newcastle, &c. Banking Company v. Hymers.* 367

ADVANCEMENT.

See SATISFACTION.

ADVOWSON.

1. A., seised of an advowson, of which his son *W. J.* was incumbent, devised it to trustees to sell on his son's death and divide the produce between his own nine children. Held, by the Master of the Rolls, and afterwards by the Lord Chancellor and Lords Justices, that, on the death of *W. J.*, the right of presentation which then accrued and could not be legally sold, passed by the will, and did not descend to the heir. Held also, by the Master of the Rolls, that the Court had authority to make a partition of an advowson, and would follow by analogy the rule as to co-parceners, and give the right of presentation to the members by seniority; but the Lord Chan-

cellor and Lord Justice Knight Bruce held, that the right to present was to be determined between the children by lot. *Johnstone v. Baber.* Page 562

2. The Court can make a partition of an advowson. *Ibid.*

AMENDMENT.

The original bill sought relief against the Defendant, as mortgagee in possession. The Defendant, by his answer, claimed under a conveyance from the Plaintiff. By amendment, the Plaintiff, abandoning the relief under the mortgage title, sought to avoid the conveyance. A motion by the Defendant, that the amended bill might be taken off the file, or that the Plaintiff might pay the costs up to the amendment, was refused. *Allen v. Spring.* 615
See Costs, 4, 5.

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CUMULATIVE LEGACIES.

ANSWER.

To a bill to set aside a conveyance as fraudulent, under the statute of *Elizabeth*, the Defendant, by his answer, refused to answer any portion of it, on the ground that the statute imposed a forfeiture and six months imprisonment. After the time for excepting had expired, the Plaintiff amended his bill, by striking out the allegations of fraud, and by attempting to remove the objection, and he

death, that the bonuses were accretions to the trust, and did not belong to his executors. *Gilly v. Burley.* Page 619

BREACH OF TRUST.

1. *A.* and *B.* were trustees. A deed was prepared appointing *C.* a new trustee in the place of *B.* It was executed by *C.*, but not by the other parties, so that the appointment was invalid. At the same time, the trust fund was transferred by *A.* and *B.* to *A.* and *C.* Afterwards *A.* and *C.* authorized the husband of the tenant for life to receive the fund, and it was lost. Held, that both *C.* (who had not been appointed a trustee, though she had acted as such), and *B.*, were liable for the loss. *Pearce v. Pearce.* 248
2. Two trustees executed a release for trust money, but one alone obtained possession of it, and he invested it on improper security. Held, that the other was liable, for it was his duty to see that it was properly invested. *Thompson v. Finch.* 316
3. A testator who died in 1835, directed his executors and trustees (*A.* and *B.*) to convert his real and personal estate, and after paying his debts, &c. to invest the proceeds on mortgage of freeholds, &c. or on government securities. *A.* and *B.* deposited the proceeds in a Bank, at interest, in their joint names. *A.* died in 1842, and *B.* drew out the balance and applied it to his own use. No suf-

ficient reason being shown for retaining the money in the Bank, it was held, that the estate of *A.* was liable to make good the loss. *Gibb v. Taylor.* Page 344
See EXECUTOR, 1, 2, 3, 4, 5, 6, 7.

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REVERSIONARY INTEREST.

SOLICITOR.

BUILDING SOCIETY.

A benefit building society took a mortgage from a member before its rules had been certified and deposited. These formalities having afterwards been complied with, it was held, that the deed was exempt from the stamp duty under the 6 & 7 Will. 4, c. 32, and 10 Geo. 4, c. 56, ss. 7, 37. *Williams v. Hayward.* 226

BURIAL GROUND.

Persons had purchased family graves in perpetuity in a private burying ground, which was afterwards closed by order of the Queen in council. There was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money, stating the purchase. Held, that they were entitled to an injunction to restrain the trustees from removing or injuring the graves or grave-stones, &c. But held also, that the relief must be limited to the spot purchased by the Plaintiffs, and that the rights of the trustees to the remainder was unaffected. *Moreland v. Richardson.* 596

CHAMBERS.*See EVIDENCE.**PRACTICE IN CHAMBERS.***CHARGE.***See JUDGMENT, 2, 3.**MERGER.***CHARGING ORDER.**

Parties interested in a fund standing in the name of the Accountant-General in one suit, were ordered to pay the Defendants in another suit their costs. These being taxed, and a minute having been left with the senior Master of the Common Pleas, this Court, on petition, made a charging order on the fund for such costs, and granted an interim stop order. *Wells v. Gibbs.* Page 204

CHARITY.

1. The Court of Chancery has jurisdiction to alien the real estate of a charity, and it can do so upon an application under Sir *Samuel Romilly's Act*. *Re Ashton Charity.* 288

2. A testator gave 4,000*l.* to his executors upon trust, with the concurrence of his sister, to settle it by deed on trust to provide stipends and annuities for indigent persons, not exceeding nine. The deed was also to regulate the management, &c. of the institution. He also devised nine freehold houses to his sister, suggesting to her, but without imposing any obligation, legal, equitable, or moral, that they might be converted into

almshouses, for the recipients of the income of the legacy. By a codicil he revoked such parts of his will "as related to the building of certain almshouses" (there was none), and released his executors "from carrying out the same and the stipends and annuities connected therewith." Held, first, that the charitable gift was valid; and secondly, that it had been revoked by the codicil. *Baldwin v. Baldwin.* Page 413

*See MORTMAIN.***CHEQUE.***See PUBLIC COMPANY, 3.***CHILDREN.**

1. A testator bequeathed leaseholds equally to his four grandchildren, and after their decease, to "such lawful issue" as they or any or either of them should leave. Held, that on the death of each grandchild, his issue of every degree then living became equally entitled to his one-fourth, and that issue was not to be read "children," though in a subsequent gift he had used that expression. *Waldrone v. Boulter.* 284

2. Under a similar devise of renewable leaseholds and copyholds to the four grandchildren equally, and after their death, "for such children as they or any or either of them should leave her or him surviving." Held, that on the death of each grandchild, his "children" then surviving took as tenants in common. *Ibid.*

CHIMNEY.

A. sold to *B.* (the owner of the adjoining premises) the right of using two chimneys in *A.*'s wall. The consideration was paid, and they were used for eleven years, but no grant was executed. *C.* purchased *A.*'s house without notice of the right; but there being fourteen chimney-pots on the wall and only twelve flues in *A.*'s house, the Court held, that *C.* was put on inquiry, that he had constructive notice of the right, and was bound by it, and an injunction was granted to restrain *C.* from stopping up the two chimneys. It was also held, that it was not necessary that the bill should pray for a specific performance, and that the absence of a grant was immaterial. *Hervey v. Smith.* Page 299

CHURCH.

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CONTINGENT REMAINDERS.

Devised to trustees and their heirs to preserve contingent remainders. Held to pass an estate during the life of the tenant for life only and not in fee. *Haddelsey v. Adams.*

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CONTRACT.

The owner of a plot of ground agreed to grant a lease of it to *A. B.* as soon as the latter had erected a villa thereon. But it was stipulated, that if *A. B.* should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. *A. B.* was to insure in a particular way, and he was to have the option of purchasing the fee within two years. *A. B.* erected the villa, but insured in the wrong office and in the wrong name. Held, that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a spe-

cific performance of the contract for sale was decreed. *Green v. Low.* Page 626
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IMPLICATION.

SPECIFIC PERFORMANCE.

VENDOR AND PURCHASER.

CONTRIBUTION.

See INSURANCE.

CONTRIBUTORY.

1. Where, after the objects of a company have totally failed, and it is insolvent, and practically at an end, other persons are induced to join the concern, and even sign the deed, by misrepresentations made by the directors as to the flourishing state of the concern, they are not liable to be made contributories. *Bell's Case, In re "The Universal Provident Life Association."* 35
2. The result would be different, where the misrepresentations are made by the proprietors on the original constitution of the company, and the question of contribution arises between a number of innocent shareholders. *Ibid.*
3. A director of a joint stock company proposed to retire from the company and be released from all liability. The board assented to this, on his making a loan to the company. He did so, and transferred all his shares to some of the continuing directors. The Court held that the transaction was invalid, and placed his name on the

list of contributories for the whole of the shares. *Daniel's Case, Re the Universal Provident Life Association.* Page 43

4. A. B. became a shareholder and director of a company, on the representations of one of the directors, that it was in a flourishing condition, whereas it was on the verge of insolvency. Held, that the misrepresentation did not relieve A. B. from being a contributory. *Holt's Case, Re the Universal Provident Life Association.* 48
5. There being a disagreement between two sections of directors of a joint stock company, it was agreed that one section should retire, and transfer their shares to the continuing directors. The shares were transferred accordingly, and were afterwards again transferred, and, at the date of the winding-up order, stood in the names of other persons. The Court held, that the first arrangement was invalid, and that the retiring directors were still contributories, notwithstanding the subsequent transfers. *Munt's Case, In re the Universal Provident Life Assurance Association.* 55

CONVERSION.

Subject to the debts, &c., real estates were devised to A. They were all sold in an administration suit, to which the devisee was a party. After payment of the debts, &c. there remained a sum in Court at the death of the devisee. Held, that it was of the character of

real estate, and passed to her heir.
Cooke v. Dealey. Page 196

COPYHOLDS.

By a voluntary settlement, the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds. Held, that this Court would not render its assistance to compel the voluntary settlement to be perfected. *Dening v. Ware.* 184

COSTS.

1. When the interest of a mortgagee is regularly paid, and the mortgagor has never been called on to discharge the principal, the costs of a transfer of the mortgage, made by the mortgagee without any communication with the mortgagor, are not properly chargeable against him. *In re Radcliffe.* 201
2. A mortgaged to B, and the securities were prepared by a firm of solicitors in which B. was a partner. The firm acted for the mortgagor. Held, that B.'s security did not extend to the bill of costs of the firm. *Gregg v. Slater.* 314
3. Pending a foreclosure suit, the mortgagee was fully paid. He, however, made further claims and brought the cause to a hearing. His claim appearing unfounded, he was ordered to pay all the subsequent costs. *Ibid.*
4. Where a charge against a Defendant is struck out by amendment,

the Defendant is not justified in entering into evidence on the subject. *Stewart v. Stewart.* Page 393

5. The original bill insisted on the invalidity of the appointment of new trustees made by the Defendant on the ground of her mental incapacity. Though the charge as to mental incapacity was struck out by amendment, the Defendant, nevertheless, entered into evidence on the subject. Held, that the course was improper, and though the appointment was upheld, and the Plaintiff was ordered to pay the costs relating to that matter, yet the Defendant was ordered to pay the costs of the evidence as to her mental capacity. *Ibid.*

See AMENDMENT.

CHARGING ORDER.

- RECEIVER PENDENTE LITE**, 1,
 2, 3.
TRUSTEE, 2.

CREDITOR.

- See ADMISSION OF ASSETS*, 3.
JUDGMENT, 1, 2, 3, 4.

CROWN.

- See FORFEITURE*, 1, 2.
TRUSTEE, 1.

CUMULATIVE LEGACIES.

The testator bequeathed to A., for her life, an annuity of 10*l.*, the annuity of 19 guineas upon the death of A., and the annuity of 50*l.* when the mortgage on his estate should be reduced to 500*l.*, "and which respective sums of 10*l.*, 19 guineas, 50*l.*, as the case might be, were to



be paid" half-yearly. Held, that they were cumulative. *Hartley v. Ostler.* Page 449

DEBT.

A., in January, 1853, gave to *B.* his I. O. U. for 65*l.* After *A.*'s death, *B.* having claimed the amount, his receipt for the amount was produced. *B.* swore, positively, that the amount had never been paid. The Court held, that it could not act on his unsupported testimony against the written evidence. *In re Farrow's Estate.* 400

DEBTOR AND CREDITOR.

See DEBT.

POLICY OF ASSURANCE.

VOLUNTARY SETTLEMENT, 1.

DEED.

Every deed is to be taken most strongly against the grantor; but where the owner of an estate, on his marriage, settles it upon himself for life, with remainders over, and is therefore, in one sense, both grantor and grantees, his interest under the deed is to be construed as if a stranger had been the grantor. *Vincent v. Spicer.* 380

See IMPLICATION.

PUBLIC COMPANY, 2, 3.

UNMARRIED, 3.

DELAY.

See RESCINDING CONTRACT, 1, 2.

VENDOR AND PURCHASER, 6, 9.

DEMONSTRATIVE LEGACY.

The testator bequeathed to *C. W. C.* the full amount of whatever sum *H. H.* might be indebted to *C. W. C.* at the testator's decease. The testator added, "and it is my positive will, that the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share to which *H. H.* becomes entitled to a life interest under my will." The share of *H. H.* proved insufficient to pay the debt. Held, that this was not a demonstrative legacy to *C. W. C.*, and that his debt could only be satisfied out of the assets so far as the share of *H. H.* therein would extend. *Courd v. Holderness.* Page 391

DEMURRER.

1. In a bill against *B.* and *C.* the Plaintiff stated a circumstance, which was material in order to charge *C.*, not positively as a fact, but as an allegation made by *B.* A demurrer by *C.* was allowed. *White v. Smale.* 72
2. Demurrer overruled, on the ground that the bill involved questions of too difficult a nature to decide on demurrer. *Hope v. Hope.* 351

DEVASTAVIT.

See EXECUTOR.

DEVISE.

See CONTINGENT REMAINDERS.

ESTATE, 1, 2.

SURVIVORSHIP, 1.

WILL.

DIRECTORS.

See CONTRIBUTORY.

PUBLIC COMPANY, 1, 3.

DISCOVERY.

1. The Plaintiffs and Defendants were partners in a colliery, the lease of which expired in 1846. The Defendants gave notice to dissolve at the expiration of the old lease, and they obtained a renewal to themselves. The Plaintiffs insisted that they were entitled to participate in the new lease, and stated facts in support of that equity. The Defendants, by answer, denied the Plaintiffs' right, and declined to set out the accounts of the subsequent profits of the colliery, or to produce the documents subsequent to the dissolution, which, they said, did not tend to shew the Plaintiffs' right to a decree, until the Plaintiffs had established some right in the new partnership. Held, that they were bound to answer and to produce. *Clegg v. Edmonson.* Page 125

2. Where the Defendant, neither pleading nor demurring, answers the bill, he must answer fully : but there are exceptions to the rule, as where the Defendant sets up a distinct and independent title in himself, which, if established, will destroy the Plaintiff's title. In that case, he is not bound to produce or set out any documents which he swears establish his own title, and do not establish that of the Plaintiff. Cases where the discovery would subject the De-

fendant to penalties and forfeitures are also exceptions to the rule.

Clegg v. Edmonson. Page 125

3. The expression, "tending to make out the Plaintiff's title," means, his title to the relief which he seeks by his bill. *Ibid.*

See ANSWER.

DISCRETION.

1. A testator empowered his widow, if his children should conduct themselves to her satisfaction up to the age of twenty-five, and marry with her approbation, but not otherwise, to give them 1,000*l.* each for the purpose of setting out in the world. Held, that she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried. *Davidson v. Rook.* 206
2. A testator authorized his trustees to apply any sum not exceeding 600*l.* in the purchase of church preferment for A. A. died before any sum had been so applied. Held, that the gift wholly failed. *Cowper v. Mantell.* (No. 2.) 231

DISCRETIONARY POWER.

See DISCRETION.

REVOCATION.

DISMISSAL.

See RECEIVER PENDENTE LITE.

1, 2.

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EASEMENT.

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ENJOYMENT IN SPECIE.

See LEASEHOLDS.

ERROR.

See MORTGAGE, 1.

ESCHEAT.

See TRUSTEE, 1.

ESTATE.

Devise to trustees and their heirs to preserve contingent remainders. Held to pass an estate during the life of the tenant for life only, and not in fee. *Haddelsey v. Adams.*

Page 266

Devise to trustees and their heirs, in trust for A. and his wife for their lives, and after the death of the survivor, to testator's four granddaughters, as tenants in common, during their respective lives, with benefit of survivorship, remainder to the trustees "and their heirs," upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder to the testator in fee. Held, that the granddaughters took for life as tenants in common, with survivorship to the survivors and survivor of them; and that after the death of the last survivor, their issue took several inheritances in tail. Held, also, that the limitation to trustees and their heirs to support contingent remainders was not a fee, so as to make the subsequent re-

mainders equitable and prevent the coalescing of the remainder to the issue with the life estate to the parent, and therefore that the four grand-daughters took estates tail. *Haddelsey v. Adams.*

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ESTATE FOR LIFE.

See ESTATE.

EVIDENCE.

1. Observations as to the danger of allowing a party to mend his case, upon a reference back to Chambers, after it has been brought before the Court, and the exact point in which the evidence is thought to be defective is known. *Basham v. Smith.* 190
2. On a question of legitimacy, it appeared that the child had been born three months after the marriage. It was suggested that the wife had not seen the husband until immediately before the marriage; and at the period of conception he was married to another person. In the cross-examination of the mother, it was proposed to ask her, "How long she had known her husband before her marriage." This question was objected to, but the Court allowed her to be asked,—"When did you first become acquainted with your husband?" and she having answered twelve months before her marriage, the Court would not permit this subject to be further pursued. *Anon. v. Anon.* 481

3. Little reliance is to be placed on the evidence of surveyors in a contest as to value. *Waters v. Thorn.* Page 547.
See Costs, 4, 5.

DEBT.

REFORMING DEED.

EXAMINATION VIVA VOCE.

See PRACTICE IN CHAMBERS.

EXECUTOR.

1. Where executors have neglected to realize assets, which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. *Hughes v. Empson.* 181
2. Losses occurred by the non-sale of *Crystal Palace* shares, which were at a premium at the testator's death, but subsequently fell to a discount. The executors were charged by the certificate with the value at the end of two months, but the Court varied the certificate to twelve months. *Ibid.*
3. If one executor does an act which enables his co-executor to obtain sole possession of money belonging to the estate and which, but for that act, he could not have obtained possession of, and the money is afterwards misapplied by such co-executor, both are liable for the loss. *Candler v. Tillett.* 257
4. C., who knew that T., his co-executor, owed money to the testator

on an equitable mortgage, allowed him to keep the title deeds in his sole possession, taking no steps to compel payment, though he was very active in recovering a debt due to himself personally from T. T. deposited his title deeds with another person as a security for fresh advances, and the testator's debt was lost. Held, that C. was liable. *Candler v. Tillett.*

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5. A testator placed his securities in the custody of T. his confidential solicitor. By his will, he appointed T. and C. his executors. T. made out a list of such securities, which he signed and retained in a box, but he gave the key to C. Afterwards, T. sent the box to C., requesting him to take out a mortgage security and send it to him for the purposes of an intended transfer. C. having no reason to suspect T. complied, and the mortgage money was received by T. alone and misapplied by him. Held, that his co-executor (C.) was not liable, it appearing from the evidence that the solicitor had a second key of the box, and could and probably did open the box himself. *Ibid.*
6. Payments to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. Thus, where the testator held shares in a banking company, and nine years after his death the bank was wound up and a call made, it was held, that payments to legatees in the meantime

could not be allowed to the executors as against the official manager in respect of the call. *The Official Managers of the Newcastle, &c. Banking Company v. Hymers.* Page 367

7. A testator died in 1829; part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom it did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute. Held, that the taking the second note was equivalent to payment of the first, and the executor was charged with the 100*l.* *Sparkes v. Restal.* 587

See ADMISSION OF ASSETS.

BREACH OF TRUST, 3.

PARTNER, 2.

EXONERATION.

A testator devised an estate (*X.*) to trustees, upon trust to raise (in aid of his personal estate) sufficient to satisfy his debts and the mortgages on his estate (*Y.*), which he devised to his daughters; and he declared that the incumbrances on *Y.* should be payable out of *X.* "in exoneration of" *Y.* On the testator's death, the real estate (*Z.*) descended to his heir at law. Held, that as between *X.* and *Z.*, the former was primarily liable to pay the mortgage and other debts. *Phillips v. Parry.*

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FELONY.

See FORFEITURE, 1, 2.

FEME COVERT.

See HUSBAND AND WIFE.

REVERSIONARY INTEREST.

FORECLOSURE.

See COSTS, 2, 3.

MORTGAGE, 2.

FOREIGN CONTRACT.

An English gentleman married a French lady and became domiciled in *France*. Differences arose between them, and they entered into a contract, without the intervention of trustees, to put an end to them. It was in the French language, and was executed by one party in *France* and by the other in *England*, and was to be performed partly in *France* and partly in *England*. The wife filed a bill for specific performance against her husband, to which he demurred. The demurrer was overruled, on the ground that the application of the French law was not, upon the statements in the bill, excluded, and that the questions of international law were too difficult to be decided on demurrer. *Hope v. Hope.* Page 351

FORFEITURE.

1. A testator devised a real estate to his widow for life, and at her death to trustees to sell and pay part of the proceeds to *B.*, who committed a felony, but had undergone his punishment before the

widow's death. Held, that his interest was not forfeited to the Crown. *In re Thompson's Trust.*

Page 506

2. The same testator directed his trustees to provide a fund, out of his personality and other real estate, to secure an annuity for his widow. The fund was provided. Held, that *B.*'s interest, being vested, became forfeited to the Crown, by his conviction for felony in the widow's life, though he had undergone his punishment previous to her death. *Ibid.*
See CONTRACT.

FRAUD.

See SOLICITOR AND CLIENT.

VOLUNTARY SETTLEMENT.

FRAUDULENT DEED.

See VOLUNTARY SETTLEMENT, 1.

FREIGHT.

See SHIP, 1, 2, 3, 4.

FRENCH CONTRACT.

See FOREIGN CONTRACT.

HUSBAND AND WIFE.

FURTHER ASSURANCE.

See VOLUNTARY SETTLEMENT, 3.

GOODWILL.

1. The estate of a deceased partner is entitled to participate in the

goodwill of a business, which does not belong to the surviving partners, except by express agreement. *Wedderburn v. Wedderburn.*

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GRANT.

See BURIAL GROUND.

CHIMNEY.

HEIR.

See EXONERATION.

JUDGMENT, 1, 4.

HEIR AND NEXT OF KIN.

See CONVERSION.

HUSBAND AND WIFE.

1. An English gentleman married a French lady and became domiciled in *France*. Differences arose between them, and they entered into a contract, without the intervention of trustees, to put an end to them. It was in the French language, and was executed by one party in *France* and by the other in *England*, and was to be performed partly in *France* and partly in *England*. The wife filed a bill for specific performance against her husband, to which he demurred. The demurrer was overruled, on the ground that the application of the French law was not, upon the statements in the bill, excluded, and that the questions of international law were too

difficult to be decided on demurrer. *Hope v. Hope*. Page 351

2. The whole of a life interest in a fund belonging to a feme covert was given (under the circumstances) to her, in exclusion of all right of the assignee in insolvency of the husband, though the husband and wife were living together. *Koeber v. Sturgis*. 588

See REVERSIONARY INTEREST.

ILLEGITIMATE CHILDREN, 8.
UNMARRIED.

ILLEGITIMATE CHILDREN.

1. It is settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; but it is not settled whether a gift can be made to the future illegitimate children of a woman. *Pratt v. Mathew*. 328
2. Illegitimate children cannot take under a gift to a class of children, unless it is clear that the legitimate children never could have taken under the gift. *Ibid.*
3. A testator having married his deceased wife's sister, and while living with her as his wife, made his will, whereby he gave all his real and personal estate "to my wife" for life, and after her death upon trust "for all and every my children hereafter to be born." At the date of the will, the testator had no children whatever, but two days after a son was

born. Held, that the gift "to my wife" was good, but that the son could not take under the gift to children "hereafter to be born." *Pratt v. Mathew*. Page 328

IMPLICATION.

On the marriage of a female infant, a settlement of her personal estate was executed, giving an interest to the issue in the event of the husband surviving his wife, but none in the contrary event. Held, that the issue could not on the latter event take by implication or construction. Held, also that the husband had not, by the settlement, reduced the fund into possession. *Pringle v. Pringle*. 631

INFANT.

A party in possession of an infant's estate, under a voidable deed, treated as his bailiff, and made to account for the rents for more than six years before the filing of the bill. *Nanney v. Williams*. 452

INJUNCTION.

Application for leave to serve a notice of motion for an injunction, prior to the bill being filed, refused, the Court declining to do more than give leave to serve the notice of motion with the copy of the bill. *Simmons v. Heaviside*. 412

See BURIAL GROUND.

CHIMNEY.
TIMBER.
WASTE.

INSOLVENT.

1. The "full discharge (of a prisoner) from custody without any adjudication" by the Court, under the provisions of the 37th sect. of 1 & 2 Vict. c. 110, means a discharge from prison in a complete and unconditional form. The word "full," as applied to the word "discharge," is explained by the 38th section, which shews that the insolvent may obtain a discharge from prison on bail, or upon conditions not amounting to a full discharge. *Basham v. Smith.* Page 190
2. Therefore, where a vesting order was made, and before any final order of adjudication or any further step taken, the insolvent was discharged by the detaining creditor, and no revesting order was ever made, it was held, that the discharge was a "full discharge" under the 37th section, and that after-acquired property did not pass to the provisional assignee under that insolvency. *Ibid.*
3. A demand in respect of a breach of trust is barred by the trustee's discharge under the Insolvent Act, if properly inserted in the schedule. *Thompson v. Finch.* 316

INSUFFICIENCY.

Questions of insufficiency of answer and production of documents rests on the same grounds, and must be dealt with in the same way. *Clegg v. Edmonson.* 125

INSURANCE.

In the case of a Mutual Marine Insurance Company, where the members are numerous, the Court has jurisdiction, on a loss, to enforce contribution and payment of it, either, where the amount has already been ascertained, under the rules, by arbitration, or where it has not been so ascertained. *Taylor v. Dean.* Page 429

See BONUS.

INTEREST.

See PUBLIC COMPANY, 1.

INTERNATIONAL LAW.

See FOREIGN CONTRACT.

HUSBAND AND WIFE.

ISSUE.

1. A testator bequeathed leaseholds equally to his four grandchildren, and after their decease, to "such lawful issue" as they or any or either of them should leave." Held, that on the death of each grandchild, his issue of every degree then living became equally entitled to his one-fourth, and that issue was not to be read "children" though in a subsequent gift he had used that expression. *Waldron v. Boulter.* 284
2. Under a similar devise of renewable leaseholds and copyholds to the four grandchildren equally, and after their death, "for such children as they or any or either of them should leave her or him surviving." Held, that on the death of each grandchild, his "children"

then surviving took as tenants in common. *Waldron v. Boulter.*
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& 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate, but as the statute makes the land *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bona fide* purchaser of the lands, from the heir or devisee, is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves. *Kinderley v. Jervis.*

Page 1

JUDGMENT.

1. The rights of simple contract creditors of an ancestor, as against the descended estates, are not defeated by judgments entered up against the heir for his personal debts before suit. *Kinderley v. Jervis.* 1
2. The 3 & 4 Will. 4, c. 104, makes real estate "assets to be administered in Courts of Equity" for payment of simple contract debts of the deceased, and the 1 & 2 Vict. c. 110, s. 13, makes a judgment a charge on any lands of which the judgment creditor is seised, &c., or over which he shall have any disposing power, for his own benefit, and it makes such judgment an equitable mortgage thereon. Held, that judgments, entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, had no priority over the simple contract creditors of the intestate, in respect of the descended estate. *Ibid.*
3. It was not the object, nor is it the operation, of the statute of the 3

4. The real estate of a deceased person constitutes assets, to be administered in a Court of Equity, according to the priorities specified by the statute, and all the incidents of assets attached to it, and, consequently, such assets are liable, in the first place, to pay the debts of the deceased debtor, and, subject thereto, they belong to his devisee or heir at law, but the devisee or heir at law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor. *Ibid.*

5. By the 1 & 2 Vict. c. 110, s. 13, the legislature meant, that a judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is, over which he had a right, at law or in equity, to consider himself the beneficial owner. The

introduction of such words as "honesty" or "without committing a breach of duty" appear to be superfluous, for they are necessarily to be understood as forming a part of the clause. *Kinderley v. Jervis.*
Page 1

JURISDICTION.
See INSURANCE.

LACHES.

Delay and laches, on the part of the Plaintiff, are a good defence to a suit for specific performance, but they are inapplicable where the contract, though incomplete, has continued to be acted, as where, under a contract for lease, possession is taken and rent paid for a series of years. *Sharp v. Milligan.* 606

*See RESCINDING CONTRACT, 1, 2.
VENDOR AND PURCHASER, 6, 9.*

LAPSE.

A lady had a general power of appointing a trust fund by deed or will, and in default, half was limited to *A.* and the other to *B.* By her will, she appointed the fund to her executor and made it chargeable with her debts and some legacies, and she gave half the residue, composed of the appointed fund and her own property, to *A.* *A.* predeceased the testatrix and the bequest to him lapsed. Held, that the moiety appointed in favour of *A.* passed to

the appointor's next of kin, as part of her estate undisposed of, and not to the executors of *A.* as in default of appointment. *Chamberlain v. Hutchinson.* Page 444

LEASE.
*See PARTNERS, 4, 5.
VENDOR AND PURCHASER, 2,
6, 7, 9.*

LEASEHOLDS.

A testator gave the "residue of his estate and effects" to trustees, upon trust to sell sufficient to pay his debts, and after payment, to hold "his said residuary estate and effects," in trust to pay "the rents," interest, dividends and annual produce to *A.* for life. There was a power to let and sell with the consent of *A.* Held, that *A.* was entitled to enjoy leaseholds in specie. *Hind v. Selby.* 373

LEGACY.
See WILL AND THE REFERENCES.

LEGITIMACY.

On a question of legitimacy, it appeared that the child had been born three months after the marriage. It was suggested, that the wife had not seen the husband until immediately before the marriage, and at the period of conception he was married to another person. In the cross-examination of the mother it was proposed to ask her "how long she had known her husband before her marriage." This question was objected to, but

the Court allowed her to be asked, "when did you first become acquainted with your husband?" and she having answered, twelve months before her marriage, the Court would not permit the subject to be further pursued. *Anon.*
v. Anon. Page 481

LIMITATION.
See ESTATE.

MARRIAGE SETTLEMENT.
Settlement by husband of all his personal estate to which he was then or might thereafter become entitled, in trust for himself for life, with remainder absolutely to his wife. Held, not to comprise his interest in a fund bequeathed to him for life, with remainder to his children.
St. Aubyn v. Humphreys. 175

MERGER.

1. Charge paid off by a person having only a partial interest in the estate—Held not to have merged.
Pitt v. Pitt. 294
2. In 1824, *A.* purchased an estate, and he mortgaged it to raise part of the purchase-money. In February, 1840, it was paid off and transferred to *B.*, who in April, 1840, executed a declaration of trust in favour of *A.* *A.* died in 1848. Held, that the charge had merged. *Ibid.*

MINES.

See VENDOR AND PURCHASER, 6.

MISTAKE.
See MORTGAGE.
REFORMING DEED.

MONEY IN COURT.
See APPROPRIATION.

MORTGAGE.

1. *A.* mortgaged to *B.* his reversionary interest in a sum of 3,681*l.* stock, which the deed represented as standing in the name of two executors of a testator to secure three annuities. *A.* gave notice to the executors. There was no such sum standing in the name of the executors, but there was one sum of 2,080*l.* standing in the name of the testator, and a second sum of 2,451*l.* standing in the name of one of the executors, to answer the annuities. A subsequent incumbrancer on the whole fund also gave notice to the executor. Held, that *A.*'s security was limited to 3,681*l.* stock. *Woodburn v. Grant.* Page 483
2. A foreclosure was decreed in default of payment to three mortgagees, who were entitled "on a joint account." Before the day appointed for payment arrived one of the mortgagees died. Held, that the foreclosure could not be made absolute, but the Court appointed a new day for payment to the survivors. *Blackburn v. Caine.* 614

See APPROPRIATION.
Costs, 1, 2, 3.
SETTING ASIDE DEED.
TACKING, 1, 2.

MORTMAIN.

A testator gave 8,000*l.* to his trustees, upon trust, in case at his death or within twenty-one years thereafter, his object could be legally carried into effect, by an act passed or to be passed, to apply it for providing a site for erecting a church at *B.*, in the parish of *W.*, with proper schools attached, and for the endowment of the church. Though a separate district had not yet been created under the 6 & 7 Vict. c. 37, it was held, that the bequest was not void under the Mortmain Act, and that the Ecclesiastical Commissioners would become entitled to the legacy, if, within the stated period, such a district should be constituted under the provisions of the statute. *Baldwin v. Baldwin.* (No. 2.)

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MOTION.*See INJUNCTION.***MOTION FOR DECREE.**

Where a motion for an injunction is, by arrangement, turned into a motion for a decree, it must be set down by order to save the month's delay. *Green v. Low.* (No. 1.) 395

MOTION FOR INJUNCTION.

Where a motion for an injunction is, by arrangement, turned into a motion for a decree, it must be set down by order to save the month's delay. *Green v. Low.* (No. 1.) 395

NOTICE.*See CHIMNEY.***STATUTE OF LIMITATIONS.****OBJECT OF POWER.***See POWER.***"OR" READ "AND."**

1. In a will, the word "or" was read "and," to give effect to the manifest intention. *Maude v. Maude.*

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2. The testator bequeathed 4,000*l.* to his four sons, *B.*, *C.*, *D.* and *E.*, in trust for *A.* for life, with remainder to his issue, and in default, to the four sons "or," to such other of his sons as should be trustees in succession. He provided that, on the death of either of the four sons, his next surviving son should become a trustee in his place. *A.* survived the four trustees, and died without issue, leaving two of the substituted trustees surviving. Held, that they were not exclusively entitled to the legacy, but that it was divisible equally between them and the representatives of the deceased trustees. *Ibid.*

PARENT AND CHILD.*See SATISFACTION.***PARTNER.**

1. Classification of the three cases, in which the estate of a deceased partner is entitled to participate in

- the subsequent profits of a trade, in which his capital has been employed. *Wedderburn v. Wedderburn.* (No. 4.) Page 84
2. The estate of a deceased partner is not entitled to participate in the goodwill of a business, which belongs to the surviving partners by express agreement. *Ibid.*
 3. By partnership articles, on the death of a partner, the survivors were entitled to the goodwill. *A. B.,* a partner, died in 1801, having appointed his co-partners executors. They continued the trade, having made out an account, from which it appeared, that the assets (consisting nearly wholly of outstanding debts) were 496,000*l.*, the liabilities 410,000*l.*, and the surplus 85,900*l.*, of which *A. B.*'s share was 55,000*l.* The survivors carried this to the credit of the deceased partner's account, and they paid the amount with interest to the *cestuis que trust* as they respectively came of age. In 1831 the children claimed to participate in the profits of the subsequent trading, which, in the thirty years, had amounted to 308,000*l.*, on the ground that their capital had been employed therein. At the hearing, inquiries were directed with a view to charge them. But, on the Master's report, the Court having come to the conclusion that at the testator's death the surplus was merely nominal, that the business, to wind up, was insolvent, and that the subsequent profits were attributable to goodwill and the personal exertions and capital of the surviving partners. Held, that the Plaintiffs were not entitled to participate in the profits, so far as those profits were attributable to the goodwill and connexion in trade of the old firm, and that their share in that portion of the profits in which they would be entitled to participate, could not be estimated higher than the interest already paid. *Wedderburn v. Wedderburn.* (No. 4.) Page 84
 4. In a partnership which is not for a fixed period, one partner has no implied authority to enter into a contract for a lease for twenty-one years of premises to be used for partnership purposes, so as to bind the other partners. *Semble. Sharp v. Milligan.* 606
 5. Three partners agreed, by parol, for a lease of some premises. They entered and paid the rent. *A. B.,* one of the partners, two years afterwards, signed a contract for a lease on behalf of the firm. Possession was continued and rent paid until a dissolution. The Court, under the circumstances, inferred, that *A. B.* had authority to sign the contract, though it was denied by the other partners and made a decree for specific performance against them. *Ibid.*

PERISHABLE PROPERTY.

See LEASEHOLDS.

PLEA.

1. A plea, denying the negative allegation in the bill, is informal.

the transaction was binding on him and his representatives. *Wright v. Goff.* Page 207

2. A lady had a general power of appointing a trust fund by deed or will, and in default, half was limited to *A.* and the other to *B.* By her will, she appointed the fund to her executor and made it chargeable with her debts and some legacies, and she gave half the residue, composed of the appointed fund and her own property, to *A.* *A.* predeceased the testatrix and the bequest to him lapsed. Held, that the moiety of the fund subject to the power, appointed in favour of *A.*, passed to the appointor's next of kin, as part of her estate undisposed of, and not to the executors of *A.* as in default of appointment. *Chamberlain v. Hutchinson.* 444

PRACTICE.

See ACCOUNTANT GENERAL.

AMENDMENT.

CHARGING ORDER.

EVIDENCE, 1.

INJUNCTION.

INSUFFICIENCY.

MOTION FOR DECREE.

MOTION FOR INJUNCTION.

PRACTICE IN CHAMBERS.

PRODUCTION.

RECEIVER PENDENTE LITE, 1,
2, 3.

SUBSTITUTED SERVICE.

TRANSFER OF CAUSE.

PRACTICE IN CHAMBERS.

If a party be dissatisfied with the accounts brought in and vouched

in the Judge's chambers, he may examine the accounting party *vice roce,* but he should give notice of the points as to which he is to be examined. The accounting party may, in such case, be required to produce the documents at his examination, notwithstanding an existing order for production elsewhere. *Wormsly v. Sturt.*

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PRIORITY.

See MORTGAGE.

PROBATE.

See RECEIVER PENDENTE LITE, 1, 2.

PRODUCTION.

Questions of insufficiency of answer and production of documents rest on the same grounds, and must be dealt with in the same way. *Clegg v. Edmonson.* 125

See PRACTICE IN CHAMBERS.

PROFITS.

See PARTNER, 1, 2.

PROMISSORY NOTE.

See STATUTE OF LIMITATIONS.

PROSPECTIVE ORDER.

See ACCOUNTANT GENERAL.

PUBLIC COMPANY.

1. Directors of a trading company incurred a large debt to the bankers beyond the subscribed capital. Held, that they were entitled to be repaid by the company by means of a call, with simple, but not compound, interest, or with rests, as charged by the bankers.

- In re The Norwich Yarn Company.*
Ex parte Bignold. Page 143
2. Some of the clauses in a public company's deed of settlement are directory and some imperative. A deviation in the former may be sanctioned and confirmed by a general meeting of the shareholders, but the latter cannot unless with the assent of every individual shareholder. *Ibid.*
 3. By the deed of settlement of a joint-stock company, all cheques on the bankers were to be signed by three directors. Held, that this was directory and not imperative, and therefore, that the directors were entitled to be allowed any sums drawn from the bankers by cheques not properly signed, if *bond fide* applied for the purposes of the trade. *Ibid.*
 4. Absent members of a company held affected by the information furnished by the directors at a general meeting, and bound by the proceedings as to matters within its competence. *Ibid.*
- See CONTRIBUTORY.*
-
- REAL AND PERSONAL ESTATE.**
- See CONVERSION.*
- RECEIVER.**
1. In a suit on behalf of a number of grantees of rent-charges on the same property, who had powers of distress and entry, a Receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rent-charges. *White v. Snale.* Page 72
 2. There being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee. Held, that the Plaintiff, who was interested in the trust property, was entitled to a Receiver. *Snale v. Snale.* 584
- See RECEIVER PENDENTE LITE, 1, 2, 3.*
- RECEIVER PENDENTE LITE.**
1. A suit for a Receiver, pending a litigation for probate in the Ecclesiastical Court, is never brought to a hearing, and therefore cannot be dismissed for want of prosecution; but, after the litigation is ended in the Ecclesiastical Court, this Court will, on motion, dispose of the costs of the suit. *Barton v. Rock.* 81
 2. Where a suit is instituted merely for the protection of the assets pending a litigation for probate in the Ecclesiastical Court, the practice of the Court is, upon the grant of probate, to discharge the Receiver, stay all proceedings in the suit and dispose of the costs. *Barton v. Rock.* (No. 2.) 376
 3. In such a suit, for which there was not a reasonable foundation, the Court ordered the Plaintiff to pay all the costs, though a Receiver had been appointed. *Ibid.*

RECTIFICATION.

See REFORMING DEED.

REFORMING DEED.

1. On an application to reform a deed, the burden of proof lies on the Plaintiff, and the Court examines the evidence very jealously and must be convinced that there has been a mistake on the part of all the parties to the deed before it will reform it. *Wright v. Goff.*

Page 207

2. A valid settlement was revoked by a subsequent deed, executed for a different purpose. The mistake being proved, the latter was reformed. *Ibid.*

REMOTENESS.

1. Where there is a gift to a class, some of the objects of which are too remote, and some not, effect cannot be given to the latter separated from the former, but the whole gift is void. *Seaman v. Wood.* 591
2. The produce of real and personal estate was bequeathed upon trust for *A.* for life, and after his death upon trust "to pay or transfer" it unto such children of *A.* as should attain the age of twenty-one years, and also such children of any son of *A.* who should die under twenty-one, as should attain that age, equally, but the children of any deceased son collectively to take their parent's share equally, with certain gifts over. Held, that the whole of the limitations subsequent to the life estate were void for remoteness. *Seaman v. Wood.* 591

RENT-CHARGE.

See RECEIVER, 1.

RESCINDING CONTRACT.

1. Where there is an undue delay on the part of the vendor in making out his title, the purchaser, on reasonable notice, may put an end to the contract. *Nott v. Riccard.*

Page 307

2. The Plaintiffs, on the 28th of March, 1855, agreed to sell some property to the Defendant, the purchase to be completed on the 22nd of June. By the conditions, the vendors were bound to furnish a certain declaration as to seisin free from incumbrances. The vendors furnished an insufficient declaration, and on the 30th of May, positively refused to furnish any other. On the 23rd of July, the purchaser gave notice, that unless the requisite declaration were furnished within a fortnight, he would rescind the contract, and default being made by the vendors, he did on the 10th of August. Held, that the purchaser was justified in putting an end to the contract, and a bill afterwards filed by the vendors for specific performance was dismissed with costs. *Ibid.*

REVERSIONARY INTEREST.

1. A husband and wife made a post-nuptial settlement of the wife's reversionary chose in action. The wife survived her husband, and it afterwards fell into possession. The wife having done no act to repudiate the settlement—Held,

in a suit to charge the trustees with a breach of trust, that it was no answer to say that the settlement was void as against the *feme covert*. *Thompson v. Finch.* Page 316

2. A. B., a married woman, who was absolutely entitled to stock in Court, being separately examined, desired it to be transferred into the names of trustees, "upon trust for her absolutely, and that the dividends should be held and applied for her separate use for her life." This was accordingly done. Held, that, during coverture, she could dispose of her life interest, held for her separate use, but not of her reversionary interest, and the trustee having, at her request, advanced the fund to her husband, whereby it was lost, was held liable to replace it, but her life interest was made answerable for the trustee's indemnity. *Hanchett v. Briscoe.* 496

REVOCATION.

1. A testator directed his trustees to stand possessed of a sum of money, upon trust in favour of his son and his son's wife and children, with a power to the son, on failure of issue, to appoint the fund by will or codicil. He also gave the trustees a discretionary power to give the fund to his son, discharged of all the trusts. By a codicil, the testator revoked the power given to the son, and directed that after the son's decease, and on failure of issue, the fund should go to the son's wife for life, and after her

decease, form part of the testator's residuary estate. Held, that the discretionary power given by the will to the trustees was not revoked by the codicil. *Butler v. Greenwood.* Page 303

2. A testator gave 4,000*l.* to his executors upon trust, with the concurrence of his sister, to settle it by deed, on trust to provide "stipends and annuities" for indigent persons, not exceeding nine. The deed was also to regulate the management, &c. of the "institution." He also devised nine freehold houses to his sister, suggesting to her, but without imposing any obligation, "legal, equitable or moral," that they might be converted into almshouses for the recipients of the income of the legacy. By a codicil, he revoked such parts of his will "as related to the building of certain almshouses" (there was none), and released his executors "from carrying out the same and the stipends and annuities connected therewith." Held, first, that the charitable gift was valid; and, secondly, that it had been revoked by the codicil. *Baldwin v. Baldwin.* 413

See ADEMPTION.

SATISFACTION.

1. A. B. settled property upon himself for life, with remainder to his children, with power, at his request, to advance any part thereof in his lifetime. Some advances

were made expressly under the power, besides which on the marriage of two of his daughters, *A. B.* advanced to them certain sums out of his own moneys, but there was no evidence of intention to purchase their shares. Held, that the latter advances were not to be treated as a satisfaction, *pro tanto*, of the daughters' shares under the settlement. *Samuel v. Ward.*

Page 347

2. Satisfaction can only arise where the person who makes the payment is himself the party bound to pay, or is the owner of the estate charged with the payment. *Ibid.*

SETTING ASIDE DEED.

A first mortgagee with power of sale had entered into arrangements, but not a binding contract, for the advantageous sale of part of the mortgaged property. After this he bought up, at a reduced price, the interest of the second mortgagee, without informing him of the arrangements for sale. Held, that he was not bound to inform the second mortgagee of the opportunity he had of selling; and a bill, to set aside the sale on the ground of suppression of information, was dismissed with costs. *Dolman v. Nokes.*

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See SOLICITOR AND CLIENT.

SETTLEMENT.

A covenant by a husband to settle all future-acquired property on himself, his wife and children, does not include his life interest in property bequeathed to him

with a direction to settle it on himself and his family. *White v. Briggs.*

Page 176, n.

See Bonus.

IMPLICATION.

MARRIAGE SETTLEMENT.

REVERSIONARY INTEREST.

SOLICITOR AND CLIENT, 1.

UNMARRIED, 3.

VOLUNTARY SETTLEMENT.

SHIP.

1. The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charter-party, without the mention of the word "freight." *Lindsay v. Gibbs.*

522

2. In equity an assignment of freight to be earned is valid. *Ibid.*

3. A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to *A.*, and the remaining forty shares to *B.*, and in December he assigned the freight to *C.* *A.* registered before, and *B.* after *C.*'s assignment; but *C.* gave the first notice to the charterers. Held, that *C.*'s right to the freight had priority over *B.*, but not over *A.* *Ibid.*

4. One who is interested in the freight alone, severed from the ship, held liable to contribute his proportion of the expenses incurred by the ship in earning the freight. *Ibid.*

SOLICITOR.

A. B., a solicitor, who was the only person who acted professionally in

the trust, induced his co-trustee, who was his client, improperly to sell out the trust fund, which was received by *A. B.* and applied to his own use. On the application of one of the *cestuis que trust*, the solicitor was struck off the Rolls. *In re Chandler.* Page 253

SOLICITOR AND CLIENT.

1. *A. B.* made an irrevocable voluntary settlement of his estate in favour, amongst others, of a relative who acted as his solicitor. The Court considered that *A. B.* intended to reserve a power of revocation, but that the deed was in other respects unobjectionable. *A. B.* made his will, prepared by the same solicitor, making a general devise, but not revoking the settlement. The Court then held, that it was the duty of the solicitor, when he prepared the will, specifically to have asked the testator whether he intended to revoke the deed, and not having done so, and it appearing to have been the intention of the testator that the estate should pass to his devisees, the Court decided, that although the deed would have been operative if *A. B.* had died intestate, yet that in the events which had happened, and as against all persons claiming under the settlement, the estate was subject to the trusts of the general devise contained in the will. *Nanney v. Williams.* 452
2. A solicitor purchased a property from his client, who, by a codicil, confirmed the sale and devised

the property to the solicitor. The Court having, on the evidence, held the sale invalid, also decided that the codicil was inoperative in equity. *Waters v. Thorn.* Page 547

3. A solicitor who purchases from his client is bound to establish, that the sale was as advantageous to the client as it could have been, if the solicitor had used his utmost endeavours to sell the property to a stranger. *Spencer v. Topham.* 573
4. *A.* purchased an estate from his client and afterwards sold it to *B.* *B.* employed no other solicitor than *A.* Held, that *B.* was affected with the knowledge possessed by *A.* of the objectionable nature of the transaction between himself and his client. *Ibid.*
5. Purchase by a solicitor from his client for 1,820*l.* upheld, though he had given about 100*l.* less than the value, and had two years afterwards sold part of the property at a fancy price, making a profit of 970*l.* *Ibid.*

See TAXATION, 1, 2, 3, 4.

SPECIFIC PERFORMANCE.

The Court will not decree the specific performance of a contract unless it can enforce the whole; but the difficulty seems to be removed where the part which it is impossible to enforce has already been performed. *Hope v. Hope.* 351

See CONTRACT.

HUSBAND AND WIFE.

LACHES.

VENDOR AND PURCHASER.

STAMP.

See BUILDING SOCIETY.

STATUTE OF LIMITATIONS.

A promissory note, dated the 4th of *October*, 1842, was payable "at six months' notice." An action was brought on it in *October*, 1848, and the indorsement on the writ stated, that on payment within four days, proceedings would be stayed. The action was abandoned, and a formal notice to pay in six months was given in *January*, 1850. The testator died in *December*, 1850, having devised his real and personal estate to his executors, in trust to sell, and in the first place pay his debts. A creditor's suit was instituted by the payee in 1855, to which the administrators pleaded the Statute of Limitations. The Court held, that the trust for payment of the debts prevented the operation of the statute both as to the real and personal estate, and that neither the action nor the indorsement on the writ were sufficient notice to pay, according to the tenor of the note.

Moore v. Petchell. Page 172

STATUTES.

13 *Eliz.* c. 5, s. 3.*See ANSWER.*52 *Geo.* 3, c. 101.*See CHARITY.*10 *Geo.* 4, c. 56.*See BUILDING SOCIETY.*3 & 4 *Will.* 4, c. 104.*See JUDGMENT.**TACKING,* 2.1 & 2 *Vict.* c. 110.*See CHARGING ORDER.*

INSOLVENT.

JUDGMENT.

6 & 7 *Vict.* c. 32.*See BUILDING SOCIETY.*6 & 7 *Vict.* c. 37.*See MORTMAIN.*6 & 7 *Vict.* c. 73.*See TAXATION.*

STOP ORDER.

See CHARGING ORDER.

STRIKING OFF THE ROLLS.

See SOLICITOR.

SUBPOENA.

See SUBSTITUTED SERVICE.

SUBSTITUTED SERVICE.

Application for substituted service of a *subpoena ad testificandum*, or, in the alternative, that a solicitor might produce his client before the Examiner, refused. *Spicer v. Dawson.* Page 282

SUPPRESSION.

See SETTING ASIDE DEED.

SURVEYOR.

See EVIDENCE, 3.

SURVIVORSHIP.

1. Whether the rule, that under a gift to one for life, and afterwards to the survivors of a class, the survivorship has reference to the period of enjoyment applies to real estate, *quære*. But held, the question did not arise upon a devise to

four, to hold as tenants in common, during their lives, with benefit of survivorship, inasmuch as the survivorship had reference to the extent of the estate, and not to the class of persons. *Haddelsey v. Adams.* Page 266

2. Gift of residue in trust for testator's wife during widowhood, and on her death or marriage, to pay it amongst his five children, or the "survivor or survivors" of them, at such ages as his wife should appoint, or in default at twenty-one. But in case of the death of any before his share should become "payable" leaving issue, then to pay his share to such issue. A child attained twenty-one, and died in the life of the tenant for life, leaving issue. No appointment having been made, held, the survivorship had reference to the cesser of the wife's estate, and that the issue, and not the representatives of the child, took the share. *Hind v. Selby.* 373
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TACKING.

1. A mortgagor died, having made his real estate equitable assets. Defendants, who were both mortgagees and bond creditors, were held not entitled to tack. *Irby v. Irby.* 217
2. A mortgagee may tack simple contract debts to his mortgage as against the heir where the property descended is assets in his hands for payment of simple contract debts, and consequently since the stat. 3 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debt as against the heir. *Thomas v. Thomas.* Page 341

TAXATION.

1. Taxation ordered of a paid bill of a mortgagee's solicitor in a mixed case of pressure and of improper items. *In re Rance.* 177
2. The mortgagee took legal proceedings against the mortgagor, whereby expenses were being incurred. The mortgagee's solicitor delivered his bill on the 25th of December, and the parties met to complete a transfer on the 29th of December. The bill contained a charge for an abstract, which was more than double what it ought to have been, but the solicitor refused to reduce it, and the bill was paid. It did not appear that any proposal had been made to settle the matter, and postpone the question of costs. The Court, considering that there had been both pressure and overcharge, ordered a taxation. *Ibid.*
3. Under the third-party clause (6 & 7 Vict. c. 73, s. 39) it is not necessary, where a *cestui que trust* applies for taxation of bills paid by trustees or executors, to shew that there are fraudulent over-charges. *In re Drake.* 438
4. Taxation ordered at the instance of a legatee, of a bill of costs of the executors' solicitor, for the amount of which a mortgage had been given by them. *Ibid.*

5. An order for the taxation of two out of four bills, and the delivery up of the papers, discharged, but without costs, the solicitor having attended the Taxing Master without having objected, and not having applied to discharge the order until six weeks after notice of it.
Re Wavell. Page 634

TENANCY IN COMMON.
See Joint Tenancy.

TENANT FOR LIFE.
See Timber.
 WASTE.

TENANT FOR LIFE AND RE-
 MAINDERMAN.
See Leaseholds.
 TITLE DEEDS.

TIMBER.
 A., on his marriage, settled his estate on himself for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not repairing the same." Held, that he was entitled to cut all such timber (except ornamental) as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut in a due course of management. *Vincent v. Spicer.* 380

TITLE DEEDS.
 The legal tenant for life is entitled

to the custody of the title deeds, and they will not be ordered to be deposited in Court, merely because the tenant for life is heir at law, and claims the immediate reversion against the residuary devisee. *Garner v. Hannington.*

Page 627

TRADE.
See Partner.

TRANSFER.
See Costs.

TRANSFER OF CAUSES.
 When two suits are instituted for the same object in different Courts, the parties ought themselves to apply to the Lord Chancellor to have them transferred to one Court. If they do not, the Court itself will apply to the Lord Chancellor for that purpose. *Swale v. Swale.* 401

TRUST.
See Trustee.

TRUSTEE.
 1. A testatrix devised real estate to her trustee and his heirs, in trust out of the rents to maintain her son *William* until he attained twenty-one, "and when and so soon as he should attain twenty-one, the testatrix devised it to him in fee. But in case he should die before attaining twenty-one, to his children, if any, or if none, then to the Defendants. The son did attain twenty-one, and died

- scind. Held, that although the objection as to title was waived at the bar, the vendor had a right to insist on the contract having been rescinded, and the bill was dismissed. *Hoy v. Smythies.* Page 510
4. Special conditions of sale are construed most strictly against the vendor. *Ibid.*
5. By the 8th condition of sale, a vendor reserved a right to rescind, in case of objection to title, &c., and by the 11th, misdescriptions were not to annul the sale, but be the subject of compensation. *Sembler,* that the 8th condition did not apply to cases of misdescription within the 11th condition. *Ibid.*
6. In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and, on the lessor's default, may rescind the contract. *Macbryde v. Weekes.* 533
7. A., on the 4th of Oct. contracted to grant a mining lease to B. and no time was mentioned for completion. On the 10th of Dec. B. gave notice to A. that unless he completed the contract within a month, he would rescind the contract. Held, on A.'s default, that B. was justified in giving the notice, that the time was reasonable, and a bill by A. for specific performance was dismissed with costs, although there were matters essential for the completion, which did not de-
- pend on A., but on third parties. *Macbryde v. Weekes.* Page 533
8. A purchaser, offering to perform his part of the contract, required, by notice, the vendor to complete within a month. Held, that the purchaser could not afterwards set up, as a defence to a suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice. *Ibid.*
9. A. agreed to grant a lease to B. After considerable delay on the part of A., B. gave A. notice, that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A. forwarded to B. the drafts, but he furnished no abstract, nor shewed that he was in a situation to complete. B. rescinded the contract. Held, that it was effectual, and the Court dismissed A.'s bill for specific performance with costs. *Ibid.*
10. A title depending on the validity of a purchase by a solicitor from his client forced on an unwilling purchaser, on proof of the validity of the transaction, though given in the absence of the client. *Spencer v. Topham.* 573
- See CONTRACT.*
- LACHES.
RESCINDING CONTRACT.
SETTING ASIDE DEED.
SOLICITOR AND CLIENT.
- VOLUNTARY SETTLEMENT.
1. In 1842, the testator executed a voluntary bond, payable after his

death, and, in 1850, he made a voluntary settlement in favour of other parties. His assets proved insufficient to pay the bond. Held, that there was not sufficient ground for holding that the deed was fraudulent as against the bond creditors, and that the *onus* of proving the deed to be fraudulent attached to the obligees of the bond. *Denning v. Ware.* Page 184

2. By a voluntary settlement, the settlor assigned a mortgage, and purported to convey copyholds; he also covenanted for quiet enjoyment and for further assurance. He died without having surrendered the copyholds. Held, that this Court would not render its assistance to compel the voluntary settlement to be perfected. *Ibid.*

3. It has long been settled, that the trustees and *cestuis que trust* under a voluntary settlement cannot compel the settlor to perform any further act, than he has already done, to render such a settlement operative. *Ibid.*

WASTE.

4., on his marriage, settled his estate on himself for life, "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not repairing the same." Held, that he was entitled to cut all such timber (except ornamental) as the

owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management. *Vincent v. Spicer.*

Page 380

WIFE.

A testator having married his deceased wife's sister, and while living with her as his wife, made his will, whereby he gave all his real and personal estate "to my wife" for life, and after her death, upon trust "for all and every my children hereafter to be born." At the date of the will, the testator had no children whatever, but two days after, a son was born. Held, that the gift "to my wife" was good, but that the son could not take under the gift to children "hereafter to be born." *Pratt v. Mathew.*

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WILL.

See ADEMPTION, 1, 2, 3.

ADVOWSON, 1, 2.

CHILDREN.

CONTINGENT REMAINDERS.

CONVERSION.

CUMULATIVE LEGACIES.

DEMONSTRATIVE LEGACY.

DISCRETION.

ESTATE.

EXONERATION.

GOODWILL.

ILLEGITIMATE CHILDREN.

ISSUE.

JOINT TENANCY.

LAPSE.

See LEASEHOLD.

MORTMAIN.

"OR" READ "AND."

REMOTENESS, 1, 2.

REVOCATION.

SOLICITOR AND CLIENT.

SURVIVORSHIP, 1, 2.

WINDING UP.

A Telegraph Company obtained an Act of Incorporation. It laid down about 400 miles of wires, but had spent the whole subscribed capital of 26,000*l.* and 16,000*l.* beyond, and judgments to the extent of 1,800*l.* had been entered up against the Company. On the petition of a shareholder it was ordered to be wound up, though

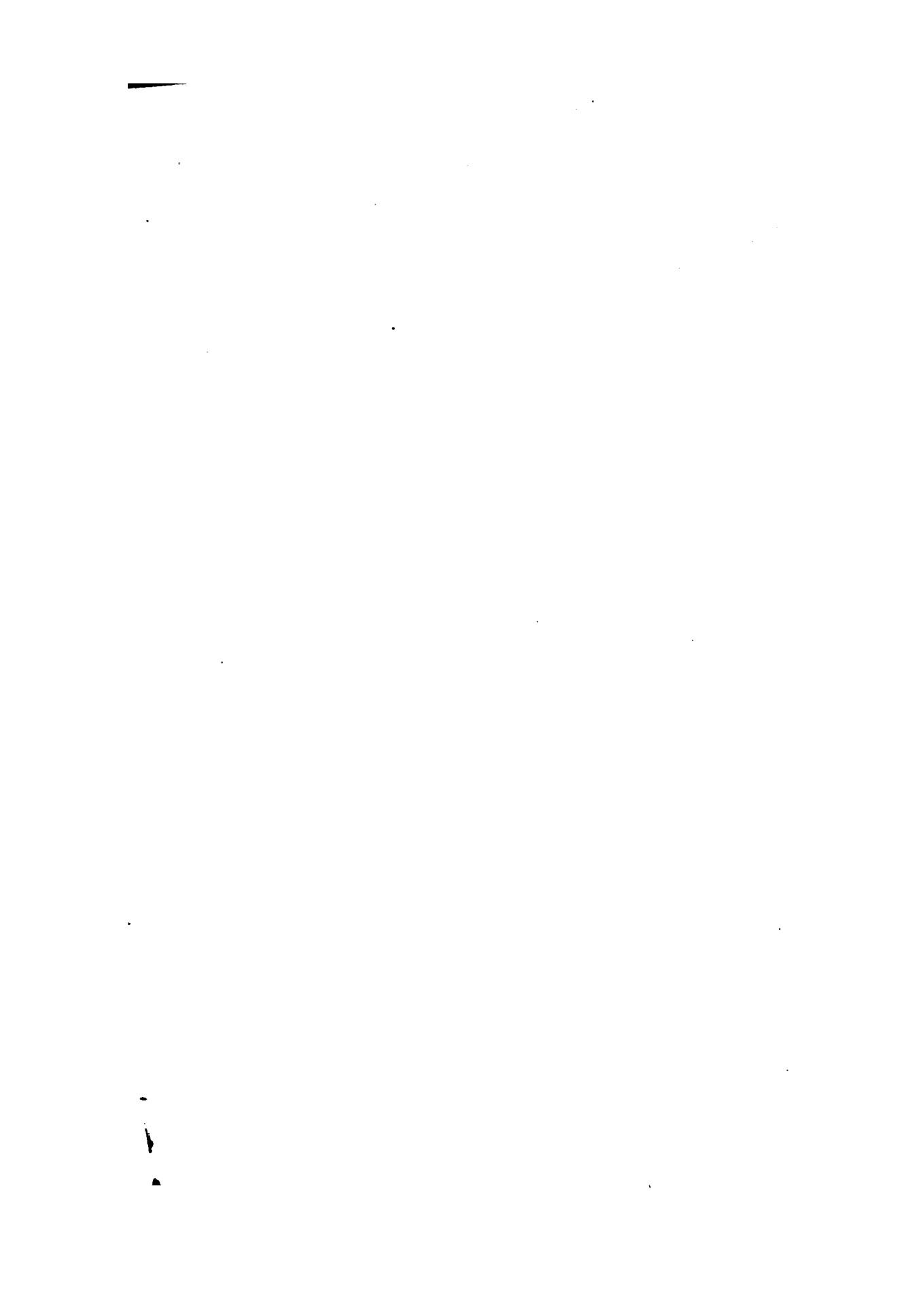
opposed by a director on behalf of the holders of one-eighth of the shares, who objected that the Act of Parliament would thereby become void, and stated that the materials would sell for very little, that the works might be completed for a small sum, and that there was some prospect of obtaining further pecuniary assistance. The Court considering that, under the circumstances, the Petitioner ought not to be compelled to go on with an undertaking, which might possibly double his present liability. *In re The Electric Telegraph of Ireland.*

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See CONTRIBUTORY.

L O N D O N :

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